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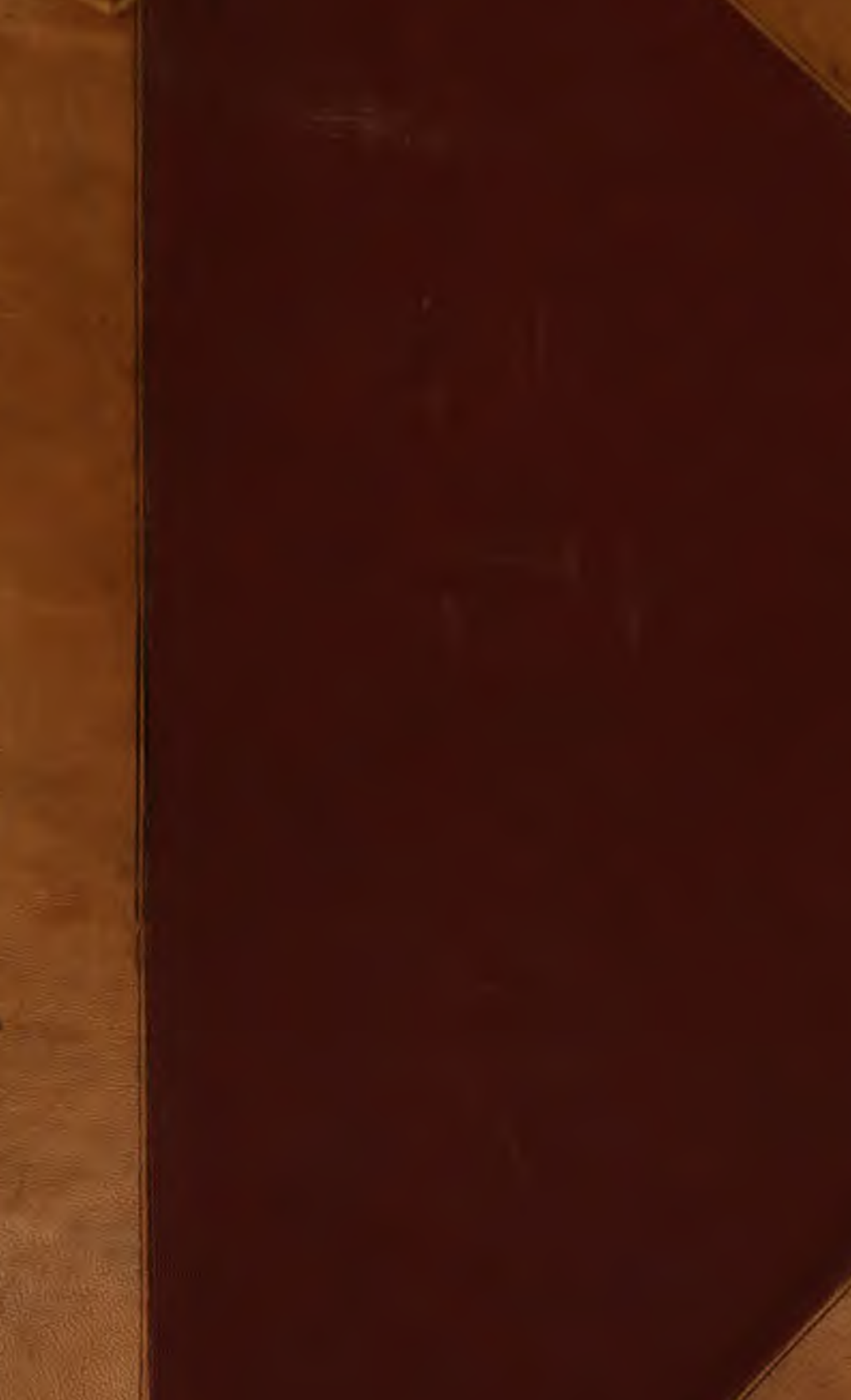
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench,
WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY
RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
CRESSWELL CRESSWELL, OF THE INNER TEMPLE, ESQRS.
BARRISTERS AT LAW.

V O L. VII.
Containing the Cases of TRINITY, MICHAELMAS, and HILARY Terms,
in the 8th & 9th Years of GEO. IV. 1827-8.

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ARGUED AND DETERMINED

1827.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Eighth Year of the Reign of GEORGE IV.

MEMORANDA.

IN the course of the last term Mr. Serjeant *Bosanquet* took his seat within the bar as King's serjeant; and on the first day of this term, the following gentlemen took their seats within the bar:

Serjeants *Taddy*, *Cross*, and *Wilde*, as King's serjeants.

Henry Brougham, of *Lincoln's Inn*, Esq., to whom a patent of precedence had been granted to rank immediately after *Charles Pepys*, Esq., the latter having taken his seat within the bar as King's counsel, on the first day of last *Michaelmas* term.

As king's counsel, *Thomas Crosby Treslove*, of *Lincoln's Inn*, Esq.; *George Rose*, of the *Inner Temple*, Esq.; *Henry Bickersteth*, of the *Inner Temple*, Esq.;

VOL. VII.

B

John

1827. *John Williams, of the Inner Temple, Esq.; John Campbell, of Lincoln's Inn, Esq.; Frederick Pollock, of the Inner Temple, Esq.; Horace Twiss, of the Inner Temple, Esq.*

Saturday,
June 16th.

DOE on the demise of PEMBERTON and Others
against ROE.

A tenancy for years, determinable on lives, is not a holding for "any term or number of years certain" within the 1 G. 4. c. 78. s. 1.

R. V. RICHARDS moved for a rule to shew cause why the tenants in possession should not enter into a rule for giving up possession, and a recognizance with two sureties for payment of costs, as required by the 1 G. 4. c. 78. s. 1. It appeared that the tenants held under a lease granted in the year 1762 "for ninety-nine years, if *R. G.*, *W. G.*, and *R. G.*, junior, or any or either of them should so long live."

LORD TENTERDEN C. J. The statute only applies to cases where the holding is for "any term or number of years certain, or from year to year." I think, that under the lease in question, there was not a holding for any term or number of years certain; the case, therefore, does not come within the operation of the act of parliament, and we cannot call upon the tenants to give security.

Rule refused.

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The KING *against* the Justices of BUCKINGHAM-
SHIRE. *Saturday,*
June 16th.

BY a local act of parliament, 54 G. 3. c. 103., the justices of *Buckinghamshire* were authorised to make an equal county rate; and in order to effect it they were empowered to call for certain returns, and were required at the next quarter sessions after those returns were made, to assess and tax every parish, &c. rateably and in due proportions. By section 10. it was enacted, that if the churchwardens and overseers of the poor within any of such parishes, &c. or any other persons, should think themselves aggrieved by any act, matter, or thing, to be done in pursuance of that act, they might appeal at the general quarter sessions for the county, to be holden next after any such cause of complaint should arise, upon giving a notice therein specified. Soon after the act passed the returns were called for and made, and the proportion which each parish should in future pay towards the county rate was fixed. At the *Epiphany* sessions in *January* 1827, the justices ordered a rate to be levied according to the proportions so fixed, and assessed a certain sum upon the parish of *Iver*; and at an adjourned sessions on the 15th of *February*, they ordered another county rate to be levied, and assessed a certain other sum upon the parish of *Iver*. The churchwardens and overseers, at the next *Easter* sessions for *Bucks*, entered an appeal against these rates, on the ground that the parish of *Iver* was thereby assessed in a much larger proportion than the parish of *Langley*

Where a county rate was made under a local act, 54 G. 3. c. 103., giving a certain right of appeal. Held, that nevertheless a party aggrieved had the larger right of appeal given by the 55 G. 3. c. 51. s. 14., which applies to all acts relating to county rates theretofore passed, whether local or general.

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SHIRE.

Marish in the same county. Fourteen days' notice of the appeal, and the grounds of it, had been given to the churchwardens and overseers of the poor of *Langley Marish*, and to the clerk of the peace for the county, and to the high constable of the hundred within which the parishes of *Iver* and *Langley Marish* are situate. The justices at sessions thought, that as a county rate had been made, and the proportion to be paid by each parish fixed in pursuance of the 54 G. 3. c. 103., they had no power to alter those proportions, either by virtue of the appeal clause in that act, or the 55 G. 3. c. 51. s. 14., and they refused to hear the appeal.

In *Easter* term a rule nisi was granted for a mandamus to the justices of the county of *Buckingham*, commanding them to enter continuances and hear the appeal.

The *Solicitor-General* and *Maltby* now shewed cause. The decision of the justices at sessions was correct; they had no power to entertain the appeal. By the 54 G. 3. c. 103., directions were given for making an equal county rate for *Buckinghamshire*, and sect. 10. gave to any person aggrieved a right of appeal to the quarter sessions next after the cause of complaint should arise. The time for appealing against the proportions of the rate in question had, therefore, elapsed long before the appeal. It will be contended that another right of appeal is given by the 55 G. 3. c. 51. s. 14. The words of that clause are certainly large, for they give to the churchwardens and overseers of the poor power to appeal, if they have at any time reason to think their parish aggrieved by any rate, whether on account of the parishes being assessed in unequal proportions, or on
account

account of their parish being rated at a higher proportion than some other parish. But s. 21. gives to the justices, where a local act applicable to their county has been passed, power to act, either under that or the general act at their election; and the rate in question was made under the local act.

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SHIRE.

Munro contra. The 21st section of the 55 G. 3. c. 51. gives the justices power to act under the local act or general act, at their election, only where the provisions of the latter are not inconsistent with those of the former. Now if, according to the 55 G. 3. c. 51. s. 14., the churchwardens and overseers had a right of appeal which did not exist under the local act 54 G. 3. c. 103., as to that the statutes are inconsistent, and the justices were not warranted in acting under the local act. By the general act, the churchwardens and overseers of the poor of the parish aggrieved have at any time, when the grievance is felt, a right of appeal. The proportions of the rate in question might be perfectly fair at the time when they were fixed, but might afterwards become very unequal; and as soon as that was the case, a right of appeal existed, *Rex v. Justices of the City of York (a)*.

LORD TENTERDEN C. J. I am of opinion that the appeal in question was made in good time, considering it as made under the 55 G. 3. c. 51. s. 14. It is true that the rate was made under the local act. But the general act in the appeal clause refers to acts and rates of a prior date. It gives a right of appeal "to the churchwardens and overseers of any parish who shall at any time have reason to think that such parish is ag-

(a) 2 B. & C. 771.

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—
The KING
against
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SHIRE.

grieved by any rate *now existing*, or hereafter to be made, either in pursuance of this act, or of any act or acts *now in force*." That applies to all statutes, general or local; the words are clearly large enough to include both. But section 21. is referred to as shewing that the 14th section ought not to receive so large a construction. The 21st section, however, relates only to the authority of the justices in assessing, levying, collecting, and enforcing the payment of the county rate. All those powers may well be exercised under the local act, if the justices think fit, and yet the right of appeal given by the 14th section of the general act may remain; and I think we ought not to put a more limited construction upon that clause, for it is very convenient that the right of appeal should be the same in all counties. The parties aggrieved may have a difficulty in ascertaining whether the rate is made under the general or local act, and may, therefore, upon the narrower construction, without any fault in them, lose the opportunity of appealing.

Rule absolute.

Monday,
June 18th.

The KING *against* The Justices of the Borough
of LEICESTER.

The 54 G. 3.
c. 84., which
enacted, that
the *Michaelmas*
quarter sessions
shall be holden

in the week next after the 11th of *October*, is merely directory, and those sessions may notwithstanding that enactment be legally holden at another time.

Where the high constable of a borough, by the direction of the justices, employed and paid a number of special constables to suppress riots at an election, and the ordinary constables were also constantly employed by him during the same period in endeavouring to keep the peace, for which service he made them a compensation: Held, that the justices were warranted in considering the monies so expended as "extraordinary expenses incurred by the high constable in case of riot," within the meaning of the 41 G. 3. c. 78. s. 2., and in making an order upon the treasurer to reimburse him those expenses.

BY an order of two justices of the borough of *Leicester*, made on the 10th of *October* 1826, after reciting that G. O., high constable of the borough, had made

application

application to them for the extraordinary expenses incurred by him in the execution of his duty as such high constable in several cases of tumult, riot, and felony occurring within the said borough, as well before as during the continuance of a contested election for members of parliament recently had therein, and that they had examined into and considered the same, they, the said justices, did thereby allow and adjudge to him, *G. O.*, the sum of 1343*l.* 17*s.*, as and for the reasonable and necessary allowances to be made to him for his extraordinary expenses upon the occasion aforesaid, and did thereby, in pursuance of the statute in that case made and provided, order and direct the treasurer of the borough to pay to *G. O.* the said sum of 1343*l.* 17*s.* By an order of the general quarter sessions, holden on the 12th of *October* in the same year, this order of the two justices was confirmed. In last *Hilary* term a rule nisi for a certiorari to remove these orders was obtained upon affidavits suggesting that the expenses of the high constable were not bona fide incurred in keeping the peace; and, also, upon the ground of several objections appearing on the face of the orders, viz., first, that they did not state the nature of the riots, nor when they took place, nor what allowances were made; secondly, that the order of confirmation was not made at the sessions holden next after the riots were alleged to have taken place; thirdly, that this order was made at a time when the sessions were not duly holden according to the statute 54 *G. 3. c. 84.*, which requires that the *Michaelmas* quarter sessions shall be holden in the first week after the 11th of *October*, whereas the sessions in question were holden in the same week, the 11th being on *Friday*, and the sessions

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against
The Justices of
Leicester.

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—
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against
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holden on the following day. The affidavits as to the expenditure were answered by others which shewed that during the election in the month of *June* 1826, there were several serious tumults and riots at *Leicester*, and that the high constable, by the direction of the justices, procured a large body of special constables to be sworn in, who, together with the ordinary constables and headboroughs, were actively employed during the whole of the election, in endeavouring to preserve the peace, and that the whole sum allowed to the high constable had been *bonâ fide* paid by him to the ordinary and special constables. Upon these affidavits another objection to the order was raised, viz. that the money allowed was not for the personal expenses of the high constable, but for payments made by him to special constables selected by him at the suggestion of the justices, and for payments made to the ordinary constables for assisting in suppressing the alleged riots.

The *Attorney General* and *Parke*, in shewing cause against the rule, were desired by the Court to confine their observations to the third and fourth objections, inasmuch as the affidavits as to the application of the money had been answered, and the orders did sufficiently state the nature and occasion of the riots, and the order appeared to have been confirmed at the quarter sessions next after it was made.

Before the 54 G. 3. c. 84., for regulating the time of holding the *Michaelmas* quarter sessions, was passed, all the quarter sessions were holden under certain ancient statutes, which were deemed merely directory, and quarter sessions holden at other times than those specified in
the

the statutes were always considered good (a). The 54 G. 3. c. 84. merely changes the time for holding the *Michaelmas* quarter sessions from the week after *Michaelmas* to the week after the 11th of *October*: it should therefore receive a construction similar to that which has been put upon the earlier statutes made in *pari materia*, viz. that it is directory only, and not imperative. As to the next objection, viz. that the 41 G. 3. c. 78. s. 2. authorizing the justices to make a reasonable allowance to the high constable for any extraordinary expenses incurred by him in case of riot, only applies to his *personal expenses*, it is difficult to understand what is meant by the expression *personal expenses*. This, however, is clear, that when a high constable, in order to preserve the peace when there is a riot, finds it necessary to have the assistance of special constables, and pays them for their services, that is an extraordinary expense incurred by him in case of riot, and the justices are authorized to award him a reasonable allowance in respect of it. The magistrates may by virtue of the 1 G. 4. c. 37. swear in special constables, and compel them to serve, and then the magistrates may pay them out of the county rate; but if special constables serve voluntarily at the instance of the high constable, and he pays them, he is entitled to be reimbursed. Lastly, it appears that the ordinary constables were compelled to perform extraordinary duties, for which it was reasonable that some recompence should be made; it might be absolutely necessary that some expense should be incurred in providing refreshment for them; this also was an extraordinary expense

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—
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against
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Lancaster.

(a) 2 Hawk. P. C. b. 2. c. 3.

incurred

1827. incurred by the high constable in case of riot, and
 ————— therefore within 41 G. 3. c. 78. s. 2.

The King
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 The Justices of
 LEICESTER.

Campbell contra. The statute 54 G. 3. c. 84. is imperative, that the *Michaelmas* quarter sessions shall be holden in the first week after the 11th of *October*. By section 1., after reciting that the time then appointed for holding the quarter sessions for the *Michaelmas* quarter might be altered, so as to render the attendance at the same more generally convenient than it then was, it was enacted, that in future the quarter sessions for the *Michaelmas* quarter shall be holden for every county, &c. in the first week after the 11th day of *October*, instead of the time then appointed for holding the same; and by section 2. it was provided that the act shall not extend to alter the time of holding the sessions for *London* and *Middlesex*. This latter clause is altogether unnecessary if the former be merely directory; nor is it easy to discover the use of the first section if the justices may, notwithstanding that enactment, still hold the quarter sessions whenever they please. Admitting the former acts to have been directory, this seems to take away the discretionary power of the justices, for it appoints a new time *instead* of that formerly fixed. This language precludes the justices from holding the sessions at the old time, and must therefore (if any language can) be considered imperative. Then, as to the remuneration given to the high constable in respect of monies paid by him to the other constables, it seems clear that the 41 G. 3. c. 78. s. 2. cannot apply to such payments. They were not made by him in the execution of his duty as high constable, and the statute applies to such payment as he
 is

and to make, or expenses that he is bound to incur that character. Besides, there is another specific mode fixed by the 1 G. 4. c. 37. for remunerating special constables in cases of riots, and it applies equally to past and to apprehended riots. By the first section, the justices are authorized to call upon, nominate, and appoint special constables. In this case the special constables were employed by direction of the justices; they come, therefore, expressly within this enactment. By the third section, the justices at sessions are empowered to order a reasonable compensation to the special constables so employed. If then the special constables on the occasion in question were employed under the powers given by that act, they should have been remunerated in the manner pointed out by the legislature; if they were not so employed, there is no legislative provision for paying them, and no attempt should have been made to do that indirectly, which could not be done directly. And this applies as well to the ordinary as to the special constables. In various instances the legislature has provided some remuneration for their services, but where that has not been done they cannot claim it. The Court cannot take notice of the quantum of service done by a constable; the law imposes that duty, and however burthensome it may be, the subject must discharge it.

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LORD TENTERDEN C. J. I am of opinion that this rule must be discharged. The matter has been fully discussed; and if we see that the only effect of granting a certiorari to remove the orders, would be to impose upon us the duty of sending them back to the justices, instead of quashing them, we ought not to take that
fruitless

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 —————
 The King
 against
 The Justices of
 Leicester.

fruitless step. The first material objection to the order was, that the quarter sessions at which it was made were not legally holden, and that, therefore, the acts done at those sessions were void. Looking at the earlier statutes upon this subject, we find that by the 12 R. 2. c. 10. the justices are required to keep their sessions in every quarter of the year at least, but no particular days are specified. By the 2 H. 5. st. 1. c. 4. it was enacted, that they "shall make their sessions four times in the year, viz. in the first week after *Michaelmas*, *Epiphany*, *Easter*, and the translation of *St. Thomas* the martyr, and oftener if need be." The modern statute 54 G. 3. c. 84. merely substitutes the week after the 11th of *October* for the week after *Michaelmas*; the question must, therefore, receive the same consideration, as if that statute had never passed. Now we find that so long ago as the time of Lord *Hale*, the earlier statutes to which I have referred were considered as directory only. After pointing out what, according to a strict construction, would be required by those statutes, Lord *Hale* adds (a), "yet it is very plain that the quarter sessions are variously held in several counties, some at one day some at another, yet it hath been ruled that these are each of them good quarter sessions within the several acts that relate to quarter sessions; for these acts, especially that of 2 H. 5. is only directive and in the affirmative; and, therefore, though the sessions are held at another day, according to the general direction of the statute 12 R. 2. yet they are quarter sessions." It has been asked, what language will make a statute imperative, if the 54 G. 3. c. 84. be not so? Negative words would have given it that effect, but those used

(a) 2 *Hale's P. C.* 50.

are in the affirmative only. This brings me to the question as to the remuneration given to the high constable. It is said that the 41 G. 3. c. 78. s. 2. merely authorizes the justices to make an allowance for his personal expenses; but that would be a very narrow construction of a statute authorizing them to reimburse him the expenses incurred in suppressing a riot; and I think that if special constables are sworn in and act under him, he may in the first instance make them a reasonable compensation, and afterwards receive from the justices an allowance in respect of that expense. This is perfectly consistent with the provisions of the 1 G. 4. c. 37. If the high constable, when called upon by others, or upon his own view thinking it necessary, appoints certain persons to assist him, it is proper that his should be the hand to pay for their services; but if special constables are sworn in by the justices without the intervention of the high constable, they should likewise pay them, according to the directions of the statute. With respect to the ordinary constables, I think that as far as any general principle can be collected from the statute 41 G. 3. c. 78. it is in favour of the payment to them for their extraordinary exertions, and that the justices were well warranted in considering such payment as an extraordinary expense incurred by the high constable, for which they might make him an allowance under the second section of that statute. Upon the whole, then, I am of opinion that the order of sessions, confirming the order of the two justices, is good, and that this rule ought to be discharged.

The rest of the Court concurring.

Rule discharged.

1827.

The King
against
The Justices of
Lancaster.

1827.

Tuesday,
June 19th.

HARE against TRAVIS.

A policy, in the usual form, was effected on pearl ashes on a voyage at and from *Liverpool* to *London*. The captain took in goods at *Liverpool* for *Southampton* as well as *London*, intending to go first to the former place. He accordingly went into *Southampton*, and delivered the goods shipped for that place, and afterwards proceeded to *London*. The termini of the voyage being the same as those described in the policy, it was held to be the same voyage until the vessel reached the dividing point, and that the policy attached, although putting into *Southampton* was a deviation.

THIS was an action on a policy of insurance on pearl ashes on board the ship *Smyrna*, on a voyage at, and from *Liverpool* to *London*. The policy contained the usual clause, that all goods were to be free from average under three per cent., unless general, or the ship were stranded. At the trial before Lord Tenterden C. J., at the *London* sittings after last term, it appeared that the captain had taken in goods at *Liverpool* for *Southampton* as well as *London*; the vessel, on the 23d of *September*, sailed from *Liverpool*, having on board the pearl ashes, which were stowed in the lower tier; she was compelled by bad weather to put twice into *Holyhead*, and upon a survey had there, it appeared she made much water. On the 30th of *October* the *Smyrna* left *Holyhead*, and from that time the hold of the ship was never free from water; while she was in the *Bristol* channel, the water pumped up took the colour out of the captain's clothes, which he attributed to its having the pearl ashes in solution. On the 1st of *November* the vessel arrived at *Southampton*, and the captain there delivered the goods shipped for that place, but the pearl ashes were not unloaded or examined there. The vessel left *South-*

The goods insured received considerable damage from sea-water. But they were not examined at *Southampton*, nor until they reached *London*, when the damage was found to amount to 60 per cent. Before the vessel reached the dividing point of the two voyages she had met with bad weather, and had made much water, and on one occasion, the water pumped up appeared to hold the pearl ashes in solution. On the voyage from *Southampton* to *London* there were no heavy seas, and the weather was tolerably fair. Under these circumstances, it was held, that it was a question for the jury, whether the pearl ashes had sustained damage to the amount of 3 per cent. before the deviation; and they having found that they had sustained damage to that amount, the Court refused to disturb the verdict.

ampton

ampton on the 4th of *November*, and arrived in *London* on the 10th. On her voyage from *Southampton* there were no heavy seas. The weather was tolerably fair, but the ship made water, although not so much as she had previously done.

The pearl ashes, on their arrival in *London*, appeared to have sustained so much damage by salt water, as to be depreciated in value upwards of 60 per cent. They were in a state of solution, and it was proved by persons conversant with the article, that that could not have happened, from coming in contact with salt water, in less time than three or four weeks, certainly not in three or four days. Upon this evidence it was contended, that the plaintiff ought to be nonsuited, inasmuch as the vessel did not sail from *Liverpool* on the voyage insured, viz. a voyage to *London*, but on a voyage to *Southampton*. That was the first port of destination; for the captain, having taken in goods for *Southampton*, must have cleared out for that place. That was the voyage contemplated and performed. Secondly, assuming that the putting into *Southampton* was a mere deviation, there was no evidence of the amount of the damage caused by the perils of the sea before the deviation took place. Lord *Tenterden* C. J. was of opinion, that the vessel did sail on the voyage insured, the captain having an intention to deviate, which intention was afterwards executed by his going into *Southampton*, and that the underwriters, therefore, were not liable for any damage which occurred after that period: therefore, it was a question for the jury upon the evidence, whether, before the vessel put into *Southampton*, the assured had sustained damage to the amount of three per cent. by a peril of the sea?

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The jury found that the damage done to the pearl ashes before the deviation exceeded three per cent.

Campbell now moved to enter a nonsuit, on the ground that the vessel did not sail on the voyage insured, for the captain intended, in the first instance, to go to *Southampton*. In all the cases on the subject, a total loss has happened before the vessel reached the dividing point, and there is no case where underwriters have been held liable after a deviation. Secondly, the underwriters were clearly discharged from all responsibility after the deviation. The pearl ashes were not examined at *Southampton*, and all goods being warranted free from average under three per cent., it was incumbent on the plaintiffs to shew distinctly that before the vessel deviated by going into *Southampton*, the pearl ashes had been injured to that amount by a peril of the sea. But there having been no examination of the cargo at *Southampton*, that became impossible. *Partie v. Tunno* (a) is an authority to shew there must be distinct evidence that the goods were damaged to that amount while they were protected by the policy, and that the evidence in this case was not sufficient for that purpose. From the 1st to the 10th of *November* the vessel was on her voyage from *Southampton*, and was frequently pumped. The damage may have occurred during that period.

Lord TENTERDEN C. J. It appeared at the trial, that the captain took in goods for *Southampton*, and also for *London*. Having loaded his vessel with goods partly

(a) 2 Camp. 59.

for one place and partly for the other, I thought it was to be inferred that he sailed on a voyage to both places, and that so long as the vessel continued in that course, which was common to a voyage either to *Southampton* or *London*, she was sailing on the voyage insured. But as the policy did not contain any clause giving liberty to the vessel to put into *Southampton*, I thought the putting into that port was a deviation, and that the underwriters were not responsible for any loss which accrued subsequently. It appeared however that the vessel met with very bad weather in the early part of her voyage; that she put into *Holyhead*, and that after she left *Holyhead*, and before her arrival at the dividing point of the voyage, when the water was pumped up, it changed the colour of the captain's clothes; and it appeared further, that in the voyage from *Southampton* to *London* the weather was fair. When she arrived in *London*, it was found that the pearl ashes had sustained damage to the amount of two-thirds of their value. Under these circumstances, I left it to the jury to say, whether before the vessel came to the dividing point, *Southampton*, the assured had sustained a loss by the perils of the sea amounting to three per cent? The jury found that they had; and I think there was evidence to support that finding.

BAYLEY J. Where the insurance is on a voyage to a given place, and the captain when he sails does not mean to go to that place at all, he never sails on the voyage insured. But where the ultimate termini of the intended voyage are the same as those described in the policy, although an intermediate voyage be contemplated, the voyage is to be considered the same

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until the vessel arrives at the dividing point of the two voyages. The departure from the course of the voyage insured then becomes a deviation; but before the arrival at the dividing point, there is no more than an intention to deviate, which, if not carried into effect, will not vitiate the policy. In *Kewley v. Ryan* (a) the policy was at and from *Grenada to Liverpool*. The ship sailed for *Liverpool*; but the captain, before the commencement of the voyage, had formed a design to touch at *Cork* on her way. She was totally lost before she arrived at the dividing point; but the termini of the intended voyage being really the same as those described in the policy, the Court held that it must be considered the same voyage; and that a design to deviate, not effected, would not determine the policy; and they observed that the ship was bound for *Liverpool*, although she had also clearances for *Cork*. That case, therefore, is an authority to shew, that until the captain in this case departed from his course towards *London*, the voyage may be considered as a voyage to *London*. Upon the other point, I agree with my Lord, that under the peculiar circumstances of this case there was evidence to go to the jury that a loss to the amount of 3 per cent. had been sustained before the deviation, and that no fault is to be found with their verdict.

HOLROYD and LITLEDALE Js. concurred.

Rule refused.

(a) 2 H. BL 345.

1827.

SMITH and Others against FERRAND.

Thursday,
June 21st.

ASSUMPSIT for goods sold and delivered. *Plas,*
non assumpsit. At the trial before *Park J.*, at the
Summer assizes for the county of *York* 1826, the fol-
 lowing appeared to be the facts of the case: The
 plaintiffs carried on business at *Gomersal*, near *Leeds*, in
Yorkshire, under the firm of the *Gomersal Mill Company*,
 and employed one *Kaye* to sell goods for them, and to
 receive the money. In *September* 1825 *Kaye* sold to the
 defendant, who resided at *Almondbury*, near *Hudders-*
field, a quantity of worsted yarn for the sum of 193*l.*
 The yarn was afterwards delivered. *Kaye* was called
 as a witness by the plaintiff; and he stated that the yarn
 was sold to be paid for on delivery by a bill at two
 months, which was considered money payment, and
 that the defendant on the 11th of *October* gave him a note
 in writing which he was to carry to his bankers at *Hudders-*
field, Messrs. *Dobson* and Co.; "Please to pay the *Gomersal*
Mill Company 193*l.*, equal to six months." This order had
 neither signature, address, nor date. On presenting
 this order to *Dobson* and Co., *Kaye* received a bill of
 100*l.* drawn on a person in *London*, which had three
 months to run, and 89*l.* 11*s.* in banker's notes; 3*l.* 9*s.*
 being deducted for discount, which was the discount for
 three months on the 100*l.*, and for six months on the
 89*l.* 11*s.* He was told at the time that he might have
 the whole in cash, allowing discount. *Kaye* afterwards
 called at *Ferrand's*, and wrote on the invoice of the
 goods the word "settled;" but he said that he, at the

Where the
 seller of goods
 received from
 the purchaser
 an order upon
 his banker for
 the price, and
 the latter (with
 whom money
 had been de-
 posited to meet
 that and certain
 other demands)
 offered to pay
 in cash, deduct-
 ing discount for
 the period of
 credit, or by a
 bill upon a
 third person,
 which the seller
 elected to take:
 Held, that,
 although the
 bill was after-
 wards dis-
 honoured, he
 could not sue
 the purchaser
 for the price of
 the goods.

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same time, told the clerk he would not give credit for more than he had received. The bill was dishonoured on the 18th of *January*; *Dobson* and Co. had failed in *December*. On the part of the defendant it was proved, that it was the usual course of trade at *Huddersfield* to sell goods of this description to be paid for by a bill at six months; and that *Kaye*, on the day he received the order, admitted that he had agreed to allow six month's discount. It was also proved, that the defendant had deposited with his bankers a 2000*l.* bill (which was duly paid), and sent to them a paper containing the names of several persons to whom different payments, amounting in the whole to 1600*l.* were to be made, and in the list was that of "*John Kaye, Gomersal, 198*l.**" It was further proved that when *Kaye* presented the order, he was asked, how he wished to be paid? He said he would take a bill for 100*l.* at three months, and the rest in banker's notes. The discount was deducted, to which *Kaye* made no objection. The learned Judge was of opinion, that as *Kaye* might have received cash from *Dobson* and Co., and thought fit, for the convenience of himself or the plaintiffs, to take a bill, the taking of that bill discharged the defendant; and as to the sum deducted for discount, the right of the plaintiff to recover that depended upon a question of fact, viz., whether *Kaye* had agreed to allow six months' discount or not, and he left that question to the jury; and he told them to find for the defendant, if, upon the whole evidence, they thought *Kaye* had so agreed, otherwise for the plaintiffs. The jury found a verdict for the defendant. A rule nisi for a new trial was obtained by Cross Serjt. in last *Michaelmas* term, on the ground that the paper in question

tion was not a check, and that the payment by *Dobson* and Co. who were the agents of *Ferrand*, was in effect a payment by him; and the bill which was given in part payment having turned out unproductive, did not operate as a discharge of the original debt.

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The Attorney-General and *Campbell* now shewed cause. It must now be taken, after the finding of the jury, that the plaintiffs sold the yarn, to be paid for either on a credit of six months or in ready money, allowing six months discount. The plaintiff's agent, *Kaye*, having elected to receive, instead of bank notes or money, a bill having three months to run, took it at his own peril, and the original debtor is discharged, although the parties to the bill failed before it became due.

Parke contra. The order in question was not a check. It was not directed to the bankers, nor signed by any one. It was a mere ticket to identify the party entitled to payment, according to the list. *Dobson* and Co. were the agents of the defendant, and as such gave the bill, which was dishonoured. The act of *Dobson* and Co. was, therefore, his act; and it is clear, that if he had given the bill to *Kaye*, it would not have been a discharge. Where there is an antecedent debt, and a bill given for it, without any indorsement by the debtor, the law implies a contract that the bill shall be paid when due, and if it is not, the original debt remains; per Lord *Eldon*, *Ex parte Blackburn* (a). In this case, the bill was given in payment by the defendant, through the intervention of his agents, *Dobson* and Co.; it has not

(a) 10 Ves. jun. 206.

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been paid, and, therefore, the original debt pro tanto remains. *Everett v. Collins* (a), is an authority expressly in point. There the plaintiff had employed the defendant to sell cattle for him, and on demanding the money produced by the sale, the defendant took the plaintiff's son to *Mingay, Nott, and Co.*, and they offered to pay him in bank notes, but he preferred a check on their bankers. The check was dishonoured. It was held, that this did not discharge the debtor, although *Mingay, Nott, and Co.* failed with a balance of the defendant's in their hands. That was decided on the ground, that *Mingay, Nott, and Co.* were considered as the defendant's agents or servants, and that their offer to pay by notes or their check, was tantamount to an offer to pay by notes or *his* check. But assuming that this was a check, the effect of it was to give to *Kaye* the option of having a bill at six months, or at any less time, or money, allowing discount. An unproductive check operates as a payment of a debt, when the party taking the check receives payment in a mode not warranted by the order. Thus, where *A.* sold goods to *B.*, for which the latter was to pay by a bill at three months, and *B.* gave *A.* a check on his bankers, (who were also the bankers of *A.*) requiring them to pay *A.* on demand, or by a bill at three months; and *A.* paid the check into the bankers, and took no bill from them, but the amount was transferred in the bankers' books from *B.*'s account to *A.* with the knowledge of both, and the banker failed before the check became due; it was held, that *A.* not having taken any bill, had not pursued the order contained in the check, and could not recover the value of the goods, *Bolton v. Richard* (b).

(a) 2 Campb. 515.

(b) 6 T. R. 159.

But

But where the taking of a bill is warranted by the order, then the taking of an unproductive bill does not operate as a payment, *Ex parte Dickson (a)*. In this case, the holder of the check had an option given by the check itself, either to take money or bills. He elected to receive part in cash and part in a bill, but that was a mode of payment warranted by the check itself, and therefore was no satisfaction unless the bill was paid. There is no case precisely in point. In all the cases bearing upon the subject where an unproductive check has been held to operate as payment, the party receiving the check has not received payment in a mode warranted by the order.

Lord TENTERDEN C. J. I think this rule ought to be discharged. It appears by the report of the learned Judge, that the defendant, being indebted to the plaintiffs and other persons in various sums of money, had deposited in the hands of his bankers, *Dobson and Co.*, a 2000*l.* bill (which was afterwards paid) to provide for payments which they had to make on his account; and he notified to *Dobson and Co.* that the plaintiffs' agent, *Kaye*, was to be paid 193*l.* When *Kaye* applied to the defendant for payment, he gave him the following order on *Dobson and Co.* "Please to pay the *Gomersal mill company* 193*l.*, equal to six months." I am clearly of opinion, looking at the terms of this instrument, that *Kaye*, when he went to *Dobson and Co.*, had a right to insist on payment in ready money on allowing six months' discount; and if they had refused to give him that, he or his principal might have taken his remedy against *Ferrand*. Whether the order on *Dobson and*

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Co. assumed the form of a regular check or not is wholly immaterial. It appears clear from the evidence, that *Kaye* might have had cash if he would, but he chose to take in part payment a bill for 100*l.* which had nearly three months to run. He therefore took a security very different from that which was taken from *Mingay, Nott, and Co.*, in *Everett v. Collins(d)*. There the party took nothing but a check or order on a banker to pay the money immediately. But here the plaintiff's agent took a bill of exchange accepted by a stranger, and having a certain time to run. That was not an order for instant and immediate payment, as the check was in the case cited. Besides, *Dobson and Co.* were not merely agents in the common meaning of that term, but agents entrusted with funds for the specific purpose of paying these demands. It seems to me, that as the plaintiffs or their agent *Kaye* thought fit to waive the right to immediate payment, and to take the security, they must bear the loss which has happened through their own default. The rule for a new trial must therefore be discharged.

BAYLEY J. I consider *Dobson and Co.* in this case as debtors to the plaintiffs for the amount of this bill. I take it to be clear, that if a creditor refer a third person to his debtor for payment, intending the third person to take payment in money, and the latter, instead of taking payment in money, takes payment in any other way, he does it at his peril. In a case before Lord *Kenyon* in 1796, it was decided that if a debtor refer a creditor to a third person for payment, and the creditor gives that third person indulgence without the knowledge and

consent of the debtor, and the third person becomes insolvent, the loss must fall on the creditor, because, as between himself and the debtor, the giving indulgence without notice operates as an agreement on his part to look to the third person, and discharge the debtor. In this case, *Kaye* received an order for 193*l.* upon *Dobson and Co.*, who stood in the condition of debtors to *Ferrand* for 193*l.*, and at that moment *Kaye* might have demanded and received payment in cash. Instead of requiring payment in cash, he took this bill at three months. To this arrangement *Ferrand* was no party; he was not even apprized of it. The taking of the bill was an act of *Kaye's*, and an act of indulgence given to *Dobson and Co.*, and then the loss arising from the insolvency of *Dobson and Co.* must fall upon *Kaye* or upon the plaintiff, his principals, with whom he is identified. The case of *Everett v. Collins* (a) is distinguishable from this, because in that case the check taken was an order for prompt and immediate payment, and was equivalent to payment; for when a party is offered the option of having either a check on a banker or a bank note, it is in effect an offer to pay in one species of cash or another. For these reasons, I am of opinion that the verdict for the defendant ought not to be disturbed. This rule must, therefore, be discharged.

LAWRENCE J. (b) concurred.

Rule discharged. (c)

(a) 2 *Campb.* 515.

(b) *Holroyd J.* was absent in the Bail Court.

(c) See *Marsh v. Pledger*, 4 *Campb.* 257., *Strong v. Hart*, 6 *B. & C.* 160.

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1887.

TORY
S. 1887GOODE *against* LANGLEY, BAILEY, RANGER, and
WEDDELL.

A. agreed with *B.* to make a gig for a given price. The body of the gig and wheels were selected by *B.*, and *A.* promised to deliver it in a few days. The full price was paid. Before it was finished, it was seized by the sheriff under a *fi. fa.* issued against *A.* The gig was afterwards finished, and delivered to *B.* with the assent of the judgment-creditor. The sheriff afterwards retook it to secure his poundage: Held, that he had no right to do so, and that *B.* might maintain trover for the gig.

Query, Whether the property in the gig vested in the purchaser before delivery?

TROVER for a gig. Plea, not guilty. At the trial before *Park J.* at the Summer assizes for the county of *York* 1826, the following appeared to be the facts of the case. The defendant *Langley*, in 1826, was sheriff of the county of *York*; *Bailey* was a sheriff's officer; *Weddell* was a coachmaker, living at *Knaresborough*; and *Ranger* was a plasterer, and the step-father of *Weddell*, with whom he resided at the time in question. On the 11th of *April* 1826, *Weddell* agreed to make, for the plaintiff, the gig in question for 37*l.*, against which sum an old debt of 20*l.* 12*s.* 6*d.* due from *Weddell* to the plaintiff, was to be set off. The body of the gig and the wheels were selected by the plaintiff at *Weddell's* shop, and he promised that the gig should be completed and delivered in a few days. The plaintiff afterwards, and before the gig was finished, paid a further sum of money, which, together with the old debt, amounted to 37*l.*, the price of the gig. On *Thursday* the 11th of *May* the plaintiff went to *Weddell's* premises for the gig: *Ranger* was there, and assisted *Weddell* in drawing it out of the yard and putting in the horse, and it was then delivered to the plaintiff. On the 5th of *May*, a *fieri facias*, on a judgment at the suit of *Ranger* against *Weddell*, had issued against the latter, directed to the defendant *Langley*, who made out a warrant to *Bailey* on the same day, which was indorsed to levy 45*l.* The sheriff took possession of *Weddell's* goods on the 6th of *May*, at which time the

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the gig was upon his premises in an unfinished state; but after the seizure by *Bailey, Weddell* was permitted to work up the materials on the premises, and he completed the gig. On the 13th of *May*, *Bailey* hearing that the gig had been taken away, went to the plaintiff's premises and took it back again; and this action was brought by the plaintiff, after a demand and refusal, to recover the value of the gig. *Ranger* and *Weddell* were living together before and after the judgment and execution, and *Ranger* looked after the workmen, and gave them directions. There were other circumstances to shew that the judgment and execution were collusive. The learned Judge left the question to the jury whether the judgment and execution were fraudulent, and the jury found that they were. A rule nisi for a new trial was obtained on the ground that trover was not maintainable, the property in the gig not having vested in the plaintiff at the time when the sheriff took possession under the fieri facias.

The Attorney-General and *E. H. Alderson* now shewed cause. The jury have found that the judgment and execution were fraudulent, and that being so, the plaintiff was clearly entitled to recover even if the gig was not completed at the time when the sheriff seized it under the fieri facias. But assuming that the property in the gig did not vest in the plaintiff before the seizure, in consequence of its not being completed, and waving the fraud, still it vested in him by the delivery of it in a complete state, with the assent of the judgment creditor, on the 11th of *May*. It is true, generally speaking, that a sheriff may maintain trover for goods which he has seized in execution; but the reason of that is, that he is answerable to the plaintiff

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plaintiff in the execution for the value of the goods so seized. But it is quite clear, that as the judgment creditor concurred in delivering this gig to the plaintiff, he could not maintain any action against the sheriff; and if so, it would seem to follow that the sheriff himself could not have maintained trover against the present plaintiff; and as to his being entitled to poundage, that right only gave him a lien upon the goods and the proceeds. It was his duty to take care not to part with the possession. By so doing, he lost his lien.

Parke contra. This action is not maintainable, for the seizure was made on the 6th of May, and at that time the gig was not completed. It is clear that the plaintiff did not acquire any property in the article until it was finished and delivered to him, *Mucklow v. Mangles* (a). The right to recover the price on the one hand, and the right of property on the other, are correlative. Until the article was completed and was delivered, the maker could not have recovered the price, nor could the person for whom the article was made maintain trover. It makes no difference that the particular materials were selected by the plaintiff, for that would give him no property in them; but a right of action only against the maker for not using those particular materials. Nor does it vary the case that a part or the whole of the price is paid by way of advance; for if part be paid, no certain portion of the article can be said to become the property of the purchaser, unless where it is so stipulated expressly or by implication, as in *Woods v. Russell* (b); nor if the whole

(a) 1 *Trum.* 518.(b) 5 *B. & A.* 948.

sum is paid, does the property in the whole vest. If, where there is no such stipulation, the article is destroyed by fire before it is finished and delivered, the part or the whole of the purchase-money paid must be refunded to the purchaser, and the vendor must bear the loss. The subsequent delivery on the 11th of *May* could not vest the property, for neither the sheriff nor his officer concurred in it; and though the execution creditor did, his act could not defeat the lien which the sheriff had for poundage; and the fraud in the judgment and execution could not affect the sheriff or his officer, for they were bound to act according to, and were protected by the writ, and they would have been so protected if there had been no judgment; and a fraudulent judgment cannot place them in a worse situation.

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Lord TENTERDEN C.J. Without entering into the question whether the property in the gig had passed to the plaintiff before it was seized by the sheriff on the 6th of *May*, it seems to me that there was sufficient evidence to support the verdict in this case. The sheriff's officer entered the premises of *Weddell* by virtue of a *fi. fa.* issued on the 5th of *May*, at the suit of *Ranger*, and seized the property. *Ranger* afterwards continued to reside on the premises and manage the concerns, and he and his debtor afterwards concurred in delivering the gig to the plaintiff. As against them, therefore, the plaintiff is clearly entitled to retain it; but the sheriff afterwards retook it, and it is said that he had a right to do so in order to receive his poundage; but I think it was his duty not to permit it to go out of his possession. When he left it in the care of the judgment creditor, and the latter delivered it to the plaintiff, he

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he was placed in the same situation as if he had expressly consented to that delivery himself. I think the sheriff had no right to take it a second time in order to secure a debt of his own, and it is quite clear that he had no right to take it on behalf of the judgment creditor or the debtor. The rule for a new trial must therefore be discharged.

Rule discharged.

See Rem.

Friday,
June 22d.

BRIGGS *against* WILKINSON and Three Others.

Where *A.*, the managing owner of a ship, mortgaged his share to *B.*, who procured the transfer to be duly indorsed on the certificate of registry, but *A.* continued in the management as before, and *B.* did not take possession or interfere in the concerns of the ship: Held, that he was not liable for repairs and necessaries done and supplied in pursuance of *A.*'s orders.

ASSUMPSIT for work and labour and materials, goods sold and delivered, &c. *Wilkinson* pleaded the general issue, the other defendants suffered judgment by default. At the trial before *Hullock B.*, at the Carlisle Summer assizes 1826, it appeared that before, and in 1823, the defendants, who suffered judgment by default, together with *H.* and *J. Bowman*, were owners of the brig *Bolton* of *Maryport*. *H. Bowman* resided at that place, and was managing owner. In the month of *November* 1823, the vessel being then at sea, *H.* and *J. Bowman*, by bill of sale reciting the certificate of registry, did, in consideration of 280*l.* before then advanced to them by *Wilkinson*, bargain, sell, assign, &c. to him, their share of the *Bolton* habendum to him and his executors, &c. for ever, upon trust that he should at any time after the 19th of *January* then next, either with or without the concurrence of *H.* and *J. Bowman*, sell and absolutely dispose of the said share of the vessel for the best price that could be obtained, and with the purchase-money first pay the expenses of the sale, and

of

of carrying into effect the trusts and powers of that deed, and of effecting insurances, together with all such other sums of money as he, (G. W.) his executors, &c. should or might thereafter pay, disburse, or become liable to as the registered owner of the vessel, or for or on account of the ship or vessel, and then to retain the sum of 280*l.* and interest; and then upon trust to pay the surplus, if any, to *H. and J. Bowman*, or as they might direct. This bill of sale was delivered to the proper officer at *Maryport* on the 19th of *December* 1823. The *Bolton* returned from sea on the 23d of *January* 1824, and on the 27th of that month the transfer was indorsed on her certificate of registry. After the execution of this bill of sale, *H. Bowman* continued to act as ship's husband as before; and in 1825 ordered the goods, for the price of which this action was brought, and they were supplied for the use of the *Bolton* by the plaintiff, who did not then know that *Wilkinson* was interested in her, nor had *Wilkinson* at that time taken possession or interfered in the concerns of the ship. In April 1826 *Wilkinson*, in consideration of 656*l.*, executed a bill of sale of his share in the *Bolton* to one *Tyson*. Upon this evidence the learned Judge thought there was no proof of the goods having been furnished upon the credit of *Wilkinson*; and as the plaintiff's counsel did not desire that question to be left to the jury, he directed a nonsuit, but gave the plaintiff leave to move to enter a verdict for 37*l.* 10*s.*, the value of the goods supplied, if the Court should be of opinion, that, under the circumstances above mentioned, the defendant was liable to the action. A rule nisi was accordingly obtained in last Michaelmas term, against which

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 Brought
against
Wilkinson.

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BRIDGE
against
WILKINSON.

The *Attorney-General* and *Parke* now shewed cause. It is quite clear that the work in this case was done, and the goods supplied on the credit of *Bowman*, and not on the credit of *Wilkinson*. The simple question therefore is, whether a mortgagee of a ship, not in possession and to whom no credit is given, is liable for the repairs of the ship and goods supplied for her use. There are two modern cases decisive as to this question, *Annett v. Carstairs* (a), *Jennings v. Griffiths* (b). In the former, which was an action by the master against a mortgagee of a ship out of possession, for his wages and disbursements, Lord *Ellenborough* said, "Title has nothing to do with these cases; we must look to the contract between the parties;" and the plaintiff was nonsuited. In the latter, which was an action against the legal owner of a ship for repairs, *Abbott C. J.* told the jury, that the question for their consideration was, "were or were not the repairs done upon the credit of the defendant," and thereupon the plaintiff's counsel chose to be nonsuited. Here it is admitted, that the repairs were not done upon the credit of the defendant. These decisions were not new in principle, but followed the rule given in the earlier cases, *Jackson v. Vernon* (c), *Chinnery v. Blackburne* (d), *M'Iver v. Humble* (e). Where repairs or stores are ordered by the master, the case is different; for, ex necessitate, he is the agent of all the owners if employed generally by them.

Alderson and *Patteson* contra. *Wilkinson* was not in the situation of an ordinary mortgagee. There was no

(a) 5 Camp. 354.

(b) 1 R. & M. 42.

(c) 1 H. Bl. 114.

(d) 1 H. Bl. 117. n.

(e) 16 East, 109.

covenant by him to reconvey the ship to the *Bowmans* upon payment of the money due, and he had power to retain out of the proceeds of the ship, when sold, all such sums as he might be compelled to pay as registered owner. By the 4 G. 4. c. 41. s. 43. (the register act in force at the time of this transfer) it is provided, "that where a transfer is made by way of mortgage, or for the purpose of effecting a sale for payment of any debt or debts, that shall be expressed in the indorsement on the certificate of registry, and then the person to whom such transfer is made shall not by reason thereof be deemed an owner." No such statement was introduced in this case, and, therefore, *Wilkinson* became owner, and liable to all the responsibilities of an owner. All the cases cited were of a mortgage of the whole ship; and it makes a great difference whether the ship is the property of one or several owners. Before this transfer, *H. Bowman* was employed by the other owners as manager; and as he continued in that situation afterwards, he was agent for *Wilkinson* as well as the other owners in all matters concerning the ship. The real question in this cause then was, not whether credit was given to *Wilkinson*, but whether credit was given to *H. Bowman* personally, or as the representative of the owners of the ship. If the jury had found that credit was given to him in the latter character, *Wilkinson* would have been liable. The case of *Jackson v. Vernon* proceeded upon the authority of *Eaton v. Jaques* (a). That case, however, was expressly overruled in *Williams v. Bosanquet* (b); and *Jackson v. Vernon* was much shaken by the observations of Lord *Kenyon* in *Westerdell v. Dale* (c), and it was again observed upon with disapprobation by *Abbott C. J.* in *Dowson v.*

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(a) *Doug.* 455.

(b) 1 B. & B. 238.

(c) 7 T. R. 306.

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Leake (a). In the case of *Frazer v. Marsh (b)*, where the registered owner had chartered his vessel for several voyages, it was held that he was not liable for stores supplied, *because* he could not be considered as owner.

Lord TENTERDEN C. J. It appears to me that the only question for our consideration is, whether the repairs done, and the stores supplied to the ship in question, can be considered as having been done and supplied under the authority of *Wilkinson*, either express or implied. Express authority there certainly was not. Then, do the facts of the case warrant the inference of an implied authority? It appeared that the order was given by *H. Bowman*, formerly a part-owner, who had parted with his legal interest to *Wilkinson*. That, however, was partially for his own benefit, and not wholly for *Wilkinson's*. Beyond the monies secured by the bill of sale, *H. Bowman* continued interested, although he no longer had a legal interest in the ship, and upon repayment of all that was due, he might have had his share of the ship re-conveyed to him. In the mean time he continued to manage the ship as before, and gave the orders in question as if no such bill of sale had been executed. During this period, *Wilkinson* never interfered with the concerns of the ship, and it is impossible for us to say that *Bowman* had his authority for giving those orders. There are certainly conflicting dicta and authorities upon this subject: they have arisen since the passing of the register acts, which appear to have influenced the judgment of the courts; I cannot, however, understand how those statutes affect the question. They

(a) *D. & R. N. P. C. 52.*

(b) *13 East, 238.*

enable a person to ascertain who are the legal owners of a vessel, but that might have been ascertained aliunde; and if the legal owners would not at common law be liable to such demands as the present merely on account of their ownership, I cannot think that they are so by reason of any thing to be found in the register acts.

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BAYLEY J. In the case of a ship, as of other property, an agent may make himself or his principal liable for repairs. But the question here is, whether *Wilkinson* can or cannot be treated as one of *Bowman's* principals? Where a ship is under the management of the master, and the owners divide the profits, the master is *prima facie* agent for them all; but the mere legal ownership does not make any person liable for the ship's debts. *Chinnery v. Blackburne* is the first case upon this point; and there the Court seem to have considered that if a mortgagee were entitled to the profits of the ship, he would be liable to the debts. Then in *Jackson v. Vernon* it was held, that a mortgagee was not liable for necessities supplied to a ship before he took possession. In *Westerdell v. Dale*, Lord *Kenyon* appears to have entertained a different opinion; but that point was not decided, and *Dale* was, independently of the mortgage, part-owner of the ship, and he was charged on the ground of that ownership. Since that time there have been many decisions that mere ownership, without proof of agency, does not render the party liable. In *Young v. Brander (a)*, and *M'Iver v. Humble*, the party had made a transfer of his interest; but for want of compliance with certain forms, the legal ownership remained with him, and that was not deemed sufficient to make

(a) 8 East, 10.

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him liable for the ship's debts. Inasmuch, then, as *Wilkinson* had merely the legal ownership as mortgagee, and *H. Bowman* had not any authority, either express or implied, to pledge his credit, I think that the nonsuit in this case was right.

HOLROYD and LITLEDALE Js. concurred.

Rule discharged.

Saturday,
June 23d.

The Duke of DEVONSHIRE against LODGE.

Grouse are not
birds of war-
ren.

TRESPASS for breaking and entering the free-chase and free-warren of the plaintiff, and killing and taking away hares, pheasants, grouse, &c. Plea, not guilty. At the trial before *Park J.* at the *Yorkshire* Summer assizes 1826, it was proved that on the 12th of *August* 1825 the defendant shot some grouse upon land the owner of which gave him leave to shoot, but over which the plaintiff claimed a right of free-chase and free-warren. Various objections were taken to the plaintiff's right to maintain the action; and, amongst others, it was contented that grouse are not birds of warren, upon which the cause was ultimately decided. The learned Judge reserved the points; and the plaintiff having obtained a verdict, a rule nisi was granted, in *Michaelmas* term 1826, for entering a nonsuit upon the several points reserved; but as the Court gave an opinion upon one only, the discussion which took place as to the others has been omitted.

The *Attorney-General*, *Solicitor-General*, and *Brougham*, on a former day in this term, shewed cause. It is difficult to find

find any reason why grouse should not be included in the protection given to other birds as birds of warren. But *Manwood's Forrest Law* and *Barrington's* case (a) are relied upon as authorities that grouse are not birds of warren. In *Manwood*, p. 362. (b), it is said that the beasts and fowls of warren are, "hare, coney, pheasant, and partridge;" and in *Barrington's* case the same enumeration of beasts and fowls of warren is given. But both those books refer to the following passage in 1 *Inst.* 233. : "The beasts of parque or chase *properly* extend to the buck, the doe, the fox, the marten, the roe; but in a *common and legal* sense, to all the beasts of the forest. There be both beasts and fowls of the warren. Beasts, as hares, conies, and roes; fowls of two sorts, viz. terrestres and aquatiles; terrestres of two sorts, silvestres and campestres; campestres, as partridge, quaille, raile, &c.; silvestres, as pheasant, woodcock," &c. Now, in the first place, Lord *Coke* makes a distinction between those things which are in a proper sense called beasts and birds of warren, and those which are so in a common and legal sense. Secondly, it is plain that the birds which he mentions are merely put as instances, and the use of the &c. demonstrates that in his opinion there were other birds of warren besides those specified. At all events, *Manwood* and *Barrington's* case, which cite this passage, are not conformable to it, for in them no mention is made of quaille and raile, which are included in Lord *Coke's* enumeration. It is certainly true that in very early times grouse are never mentioned, probably because there was then great difficulty in taking them. Netting was impracticable on the moors, and the nature of the ground made hawking very difficult

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(a) 8 Co. 275.

(b) 4th edition.

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and dangerous. But by the statute 1 J. 1. c. 27., after a recital that there were divers good laws inflicting penalties upon those who should with any gun, &c. spoil or destroy the game of pheasant, partridge, hearn, mallard, *and such like*, in section 2. a penalty is imposed upon every person who shall with a gun, &c. kill or destroy any pheasant, partridge, &c., *grouse*, heathcock, *moor-game*, &c. There they are treated as game of the same nature as pheasant and partridge, and that statute was passed about the time when *Manwood* wrote.

J. Williams, Alderson, and Parke, contra. There is no reason to suppose that *Manwood* has not accurately enumerated the beasts and birds of warren. The ground of the original reservation of warren was for hawking by the king; and accordingly we find that the birds and beasts of warren were those usually taken by long-winged hawks. It is also observable that the forest laws were of *Norman* origin, and therefore might not be applied to grouse, which are only known in *Great Britain*. *Manwood*, c. 1. s. 3. (a) says, "A forrest is not a privileged place generally for all manner of wild beasts, nor for all manner of fowls, but only for those that are of forrest chase and warren;" and he afterwards says, "the beasts and fowls of warren are these, the hare, coney, pheasant, and partridge, and none other are accounted beasts or fowls of warren." *Manwood* wrote before Lord *Coke*, and therefore in his first edition could not refer to the 1st *Inst.* In subsequent editions, published after *Manwood's* death, there is such a reference, but that proves nothing against the accuracy of the author; and the alleged inconsistency between *Man-*

(a) 1st edition.

wood and the authority upon which he is supposed to have relied does not in reality exist. *Manwood* does, however, give an authority for his list of birds of warren. In c. 4. s. 3. he repeats the enumeration of beasts and fowls of warren, and says that none other are accounted beasts nor fowls of warren; and for this he cites the *Register of Writs*, 93., the *Book of Entries*, 96., and *Fitz. N. B.* 87. He then gives the form of a grant of free-warren, and adds: "And every such charter would be very uncertain by the words 'quod ad warrenam pertinet,' if it was not certainly known what were beasts and fowls of warren; and therefore in the register in the writ of trespass, for hunting in a warren, it is averred 'that the trespass was done there in taking or driving away those beasts or fowls which are beasts and fowls of warren,' which, as *Budæus* tells us, are such as may be taken by long-winged hawks; and those are, the hare, the coney, the pheasant, and the partridge." The statute 1 J. 1. c. 27. shews that grouse were then well known and treated as game; if therefore they had been considered birds of warren, no doubt they would have been noticed by *Manwood*. Even the comprehensive language of Lord *Coke*, in 1 *Inst.* 233., does not include grouse, for they are not either *campestres* or *silvestres*.

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Cur. adv. vult.

The judgment of the Court was now delivered by Lord TENTERDEN C. J., who, after shortly stating the facts of the case, proceeded as follows: The franchise of free-warren is of great antiquity, and very singular in its nature. It gives a property in wild animals; and that property may be claimed in the land of another, to the exclusion of the owner of the land. Such a right

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ought not to be extended by argument and inference to any animals not clearly within it. Now there is not any one book in the law which has mentioned grouse as a bird of warren. *Manwood* confines his description to two species, pheasants and partridges, and he founds his doctrine upon old writs and entries, and in them birds and beasts of warren are not mentioned generally, but are specially designated. Perhaps it may not be easy at this distance of time to say why one species should be a bird of warren and not another. One reason why grouse were not so considered may be, that grouse were not birds that could be taken by any of the ordinary modes of sport in use at the time when this franchise had its origin. Another may be, that those birds were known only in some parts of *England*. Not finding these birds any where mentioned as birds of warren, and for the reasons given, not feeling it right to extend the franchise, we are of opinion that a nonsuit must be entered.

Rule absolute.

Mayer in of Marshfield. v. Chapman 12th-Mch 18.

Saturday,
June 23d.

SIR OSWALD MOSLEY, Bart., against JOHN WALKER.

The lord of an
ancient market
may, by law,
have a right to
prevent other
persons from
selling goods in

DECLARATION stated, that the plaintiff, on the 1st of *January* 1824, and long before, was and from thenceforth had been, and still was lawfully pos-

sessed of his franchise.

Where such a market had been from ancient times held in a public street, but in consequence of the increased population and traffic, persons frequenting the market-place were subjected to inconvenience and danger, and the lord had permitted part of the market-place to be used for other purposes than for the sale of articles usually sold there; in an action brought by the lord against the owner of a house adjoining to the market-place for there opening a shop and selling goods, but who, at the time when he sold the goods, had a stall in the market-place, which he might have occupied; it was held, that it was properly submitted to the jury to find whether, from the state of the market-place, the defendant had a reasonable cause for selling in his private house; and a verdict having been found for the plaintiff, the Court refused to grant a new trial.

sessed

sessed of a certain market holden in the town of *Manchester*, in the county of *Lancaster*, on *Tuesday*, *Thursday*, and *Saturday* in every week throughout the year, except on *Christmas-day* and *New Year's Day*, when they respectively happened on *Tuesday*, *Thursday*, or *Saturday*; for the buying and selling, amongst other things, of all manner of fish of such kinds as are usually bought and sold in markets; and of all liberties, customs, privileges, tolls, stallages, and all other emoluments belonging thereto; and had during all that time provided proper and sufficient stalls in the market for such persons who needed and required the same for the sale of their fish on *Tuesdays*, *Thursdays*, and *Saturdays*, being such market days as aforesaid; and also had, and of right ought to have, the correction of the market; and whereas all fishmongers and other persons selling their fish of such kinds as are usually sold in markets on *Tuesdays*, *Thursdays*, or *Saturdays*, or on any of those days, being market days in the town of *Manchester*, ought to sell the same in the open public market there, and not in any private houses, shops, or buildings in the said town, out of the open public market there, and without the licence and authority of the plaintiff; and such fishmongers and other persons selling such fish on those days in the same town upon any stalls placed there, ought to sell the same, and until, &c. had sold the same, upon the stalls of the plaintiff there, or upon stalls placed there by his permission, paying, therefore, a reasonable sum of money for every stall placed there for that purpose by the plaintiff, or by his permission, and made use of by such persons for the sale of their fish on the market days aforesaid; and thereby the plaintiff had and enjoyed, and ought to have continued to have and enjoy, great profit, &c. Yet the defendant, maliciously contriving
and

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and intending to prevent the plaintiff from enjoying the benefit of his market, to wit, on the 1st of *January* 1824, and on divers other *Tuesdays*, *Thursdays*, and *Saturdays*, each of the said *Tuesdays*, *Thursdays*, and *Saturdays* being market days in the town of *Manchester*, wrongfully and injuriously exposed to sale, and sold divers large quantities of his fish of such kinds as are usually sold and exposed to sale in markets, and as were on the same 1st day of *January* 1824, and on the said other *Tuesdays*, *Thursdays*, and *Saturdays*, being market days, exposed to sale and sold in the market of the plaintiff so holden on *Tuesdays*, *Thursdays*, and *Saturdays* as aforesaid, and being of the value of 500*l.*, in certain private houses, shops, and buildings in the same town, out of the open public market there, and not upon any of the stalls of the plaintiff, or any stalls erected by the plaintiff or by his permission, without the licence and against the will of the plaintiff, and without any lawful authority whatsoever, to the manifest injury of the plaintiff, and to the great nuisance of the said market, whereby he was deprived of and lost great part of the profits of his stalls and stallage, tolls, &c. which he otherwise would have had. Plea, not guilty.

At the trial before *Hullock* B., at the Summer assizes for the county of *Lancaster*, 1826, the following documentary evidence, coming out of the plaintiff's muniment room, was produced by his steward, in order to prove the title of the plaintiff to the market; first, an inquisition post mortem in the time of *Edward* I. A. D. 1282, and it was thereby found that the tolls of the market and fair of *Manchester* were worth 6*l.* 13*s.* 4*d.*, and that *Robert Gresley* was seised at his death, of the manor of *Manchester*, with its appurtenances, and therein, of fairs, markets, tollage, stallage, and profits of fairs and markets

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in his demesne as of fee, as part of the duchy of *Lancaster*. Secondly, an indenture, A. D. 1597, 38th of *Elizabeth*, whereby *John Lacy*, in consideration of 3500*l.*, granted, bargained, and sold to *Nicholas Mosley*, alderman of *London*, and *Robert Mosley*, his heir apparent, the said manor of *Manchester*, and all manner of courts, markets, tolls, &c. in fee. Thirdly, the books of the court-leet from 1582 to 1687, and from 1734 to the time of the trial: the intervening book was lost. It appeared by entries in these books, that inspectors for fish and flesh had been appointed at every *Michaelmas* session. The number varied from time to time; there never having been less than twelve in any one year. In 1825 there were twenty-one. In the court book for *Michaelmas* 1663 there were amercements for offering for sale unwholesome flesh, stinking salmon, and unsound herrings. It was then proved by parol evidence, that the plaintiff or his ancestors had exercised the right of supervision of the market as far back as the memory of living witnesses could go. That they had received rent for stalls in the market, and that the inspectors appointed in the court-leet had seized unwholesome fish and flesh out of the market-place. It was further proved, that the manor of *Manchester* was co-extensive with the township; that fish was sold on every day, except *Sunday* and *Christmas-day*: it was exposed to sale in the old market-place, which was a public street, and in no other place with the permission of the lord of the market. It was frequently very much crowded, and persons frequenting it were much inconvenienced by carriages, and the stalls were sometimes knocked down. It appeared that the fishmongers had made application to the plaintiff for more space, and that he had desired his steward to fix on some more
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convenient spot; and that he had, within a few years, expended 20,000*l.* in making a new market-house for flesh and vegetables. The defendant had a stall in the fish-market which he might have occupied to the exclusion of others; but in the year 1825 he took an old house out of the market-place, but adjoining to it, and opened a shop, and exposed to sale and actually sold fish there. The plaintiff told him he could not permit him to expose fish to sale out of the market, but the defendant insisted he had a right to sell in his own house. The defendant attempted to prove that fish had been sold by retail in shops out of the market-place; but he did not shew that it was ever so sold by retail with the knowledge of the lord of the market, or that there was any fishmonger's shop in *Manchester* out of the market. It was contended, on the part of the defendant, that the plaintiff had no right, as mere grantee of a market, to prevent any individual from selling fish in his private house, out of the market-place; and assuming that such a right might exist, there was not sufficient evidence to shew that it did exist in the present case: and, secondly, that the plaintiff could not recover, because it appeared that there was not convenient accommodation for the public in the market. The learned Judge told the jury there were two questions for their consideration; first, whether, from the state of the market-place, the defendant had any reasonable ground for quitting his stall, and for selling in his own house? and upon that he observed that the defendant, when applied to by the plaintiff, did not allege any want of accommodation in the market, but insisted on his right to sell in his own house. The second question was, whether they were satisfied that the plaintiff had or had not,

not, as lord of the manor and market, a right to exact stallage, in respect of all fish sold in *Manchester*, although it was sold out of the market-place? and he directed them to find for the plaintiff, if they thought that he had established such exclusive right, and that the defendant had, from the state of the market, no sufficient ground for selling in his own house. A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained in last *Michaelmas* term, on the ground that there was no evidence of a right in the plaintiff to prevent other persons from selling in their own private houses; and, secondly, that the plaintiff not having provided sufficient accommodation for the public, could not recover; and *Prince v. Lewis (a)* was cited.

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The *Attorney-General*, *Starkie*, and *Parke*, now shewed cause. There was sufficient evidence to shew that the plaintiff had the exclusive right stated in the declaration, viz. a right to compel all fishmongers to sell in the open market-place, and not in any private house; and that question was properly submitted to the jury. Secondly, the plaintiff was not precluded from recovering by reason of his not having allowed sufficient space for persons frequenting the market. As to the first point, the privilege of holding a market is in its nature exclusive. The privilege is beneficial to the public as well as to the lord of the market; for the public derive an advantage from the supervision exercised by the lord of the market, in respect of the articles there brought for sale. The lord derives an advantage from the tolls, stallage, &c.; but neither the public nor the lord could have the full benefit of the market unless the right were exclusive. It is

(a) 5 B. & C. 363.

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accordingly well established, that where the franchise of a market exists a private person cannot sell in a shop, so as to infringe on the rights of the owner of the market. In *Clifton v. Chancellor* (a) it is said, that the King cannot grant that a shop shall be market overt (b); and that is adopted by Lord C. B. *Comyns*, in his *Digest*, tit. *Market* (E), and 2 *Roll. Abr.* 123. l. 30., *Wood's Inst.* 208., and the *Prior of Dunstable's* case (c), are to the same effect. Indeed, in all the cases where an action for damages has been brought for an injury to a market, where once the right of market has been established, the question, whether the plaintiff is entitled to recover has been reduced to this, whether the plaintiff has sustained any damage? It has been assumed in all the cases, that the privilege is in its nature exclusive; and the question has been, how far, at what distance of time or place, another party can exercise a right of selling without prejudice to the lord of the market. Several such cases on the subject are collected in *Yard v. Ford* (d). Thus it has been decided, that if a market be held on the same day within certain limits, it must be intended in law to be to the damage of the lord; but if it be on a different day, then whether it is injurious or not is matter of evidence for the jury. But *Mosley v. Chadwick and others*, *Trinity* term 1782, is an authority expressly in point to show that the plaintiff in this case is entitled to recover. That was an action by an ancestor of the plaintiff against *Chadwick* and others for defrauding the plaintiff of the profits of his market by erecting another market, near the plaintiff's, for selling

(a) *Moore*, 624.

(b) i. e. to bind strangers.

(c) 11 *H.* 6. 19. a, and cited in the case of the *City of London*, 8 *Co.* 127.(d) 2 *Saund.* 172.

flesh-meat for hire and reward, without the licence of the plaintiff. Upon special verdict it was found that the plaintiff was seised of the franchise of the market, and that the defendant erected stalls very near his market, and took money in the nature of rent for those stalls, and that the profits of the plaintiff's market were thereby diminished: the Court, after argument, gave judgment for the plaintiff. (a) Assuming that it does not follow that

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(a) The following note of the judgment of the Court of King's Bench in *Mosley v. Chadwick and others*, was read by the Attorney-General.

Lord Mansfield C. J. This is an action upon the case, brought by Sir John Parker Mosley against the defendants; and it was for depriving and defrauding the plaintiff of the profits and emoluments of his market by erecting another market in a certain place near the plaintiff's market, for selling and exposing to sale flesh-meat, for hire and reward, without the licence, and against the will of the plaintiff. There is a special verdict, and the result of that special verdict is, that the plaintiff was seised of a franchise for holding a market, and that the defendants erected about 140 stalls very near his market, but that they took no toll: they had no pretence of a pie-poudre court; they had no clerk of the market; and they only took money in the nature of rent for the stalls which they had erected. The question was, Whether this action would lie, or whether it was a damage? and the special verdict finds, that there was a diminution of the profits of the plaintiff arising from the market, to the amount of 90*l.*, but the amount of the sum is not material; and the great question which arose out of the special verdict was, Whether an action would lie by the owner of such a market against another, who only made a rent of his own land applied to the use of selling, which was a lawful act, and took nothing that amounted to an usurpation of a franchise upon the crown? Upon consideration, we are of opinion, that we are bound, by the authorities cited in this case, to say, that this was a damage that carried with it that sort of injury that is sufficient to support an action. The principal authorities that were cited, we think, conclude the question. In *Br. Abt. tit. Prescription*, pl. 98., there is cited a case from the Year Books of the 11 Hen. 6. pl. 13. That was an action of trespass by the prior of *Dunstable*, alleging, that whereas he and his predecessors, time out of mind, had held the market in *Dunstable* such a day, and had the correction of the market, and the butchers who sell victuals, should sell in the high street, upon the stalls in the market by him assigned for them, for which the plaintiff had one penny a day for every stall, and that the defendant sold

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that where there is a grant of a market, the grantee, as a consequence of law, has a right to prevent the owners and inhabitants from selling in their private houses, within

in his house (a), by which the plaintiff lost the advantage of his stallage, and the correction and so forth of the market; and this was admitted to be a good prescription. The defendant prescribed that he and all householders used to sell in their houses, and the Court was of opinion, that that allegation by the defendant was a bad prescription. If a man has a market in one part of the town of *Dunstable*, the inhabitants of the other parts of the town cannot erect new houses, and in their houses and stalls sell merchandize; for this is to the damage of the market, as in the 2 *Edw.* 2. is admitted. In 2 *Roll. Abr.* tit. *Market* (B), pl. 1., it is laid down, if a man has a fair in a certain place, those who have their houses near, adjoining to the fair, cannot lawfully open their shops to sell the commodities in the fair, but stallage is due for them, for they cannot take the benefit of the fair without paying the duties which belong to the person who has the property, as determined in *Michaelmas*, 15 *Jac.* 2. in *Newington Fair* case, *Britten*, 158. c. 63.; and *Bracton*, lib. 4. c. 46. fol. 235., shew that a new market cannot be erected in the vicinity of an old one without a fresh grant. In the case of *Yard v. Ford*, in 3 *Saund.* 172. and 1 *Levinz*, 296., which is a case almost directly in point with the present, upon which we lay great stress in the judgment I am now delivering, the declaration stated, that the plaintiff was seised in fee of a market upon every *Wednesday*, for buying and selling all goods, and so on, together with tollage, stallage, and picaage, and all other profits, commodities, and emoluments whatsoever to the said market belonging, and that the defendants, without any lawful warrant or authority, at *Ashburton*, which is within seven miles, erected a new market upon every *Tuesday*, and continued the said markets so newly erected till the time mentioned in the declaration, whereby a great quantity of the goods in the said market so newly erected were sold, to the great damage of the plaintiff, and the great nuisance of his market, and by reason whereof the plaintiff lost the toll, stallage, and other profits and emoluments, which he should have had. It is to be observed, that, in this case, there was no allegation that the defendant took toll, or had a court of *pie poudre*, or any thing which would have amounted to a usurpation of a franchise upon the crown. *Twisdalen* said, if he had had a patent to levy his market, perhaps it would have been more doubtful; but it appeared that the defendant, without any lawful warrant or authority, that is to say, without patent or prescription, had levied this market, to the nuisance of the plaintiffs, which was an ancient market,

(a) In the Year Book he is stated to have done this *occulte*, and to have procured others to do the like.

and,

within the precinct of his market, still such a right may have been granted, and the evidence of the exercise of the right, in this case, was sufficient to show that such was the nature of the grant in this case; for the inspectors of the market seized unwholesome fish out of the market-place, and it appeared that there was not in *Manchester* any fishmonger's shop except in the market-place.

Then, as to there not being sufficient accommodation for the public in the market, it is no answer to the action, because the defendant had a stall in the market-place, and might have occupied that stall at the very time when he was selling fish in his shop. This case is, therefore, distinguishable from *Prince v. Lewis* (a), for in that case there was not room for the defendant on ordinary occasions, and he had no notice that there was room in the market for him on the particular occasion when the alleged cause of action arose.

Gurney, Patteson, and Wightman, contra. It was not distinctly left to the jury, whether a person could, with

and, therefore, the defendant was an apparent wrong-doer, and had no colour for doing so; and judgment was given for the plaintiff. In the case of *The King v. Marsden*, 5 Burr. 1818., *Wilmot J.* says, the reason why a fair and market cannot be holden without a grant, is not merely for the sake of promoting traffic and commerce, but for the like reason as in the *Roman law*, for the preservation of order and prevention of irregular behaviour. *Ubi est multitudo ibi debet esse rector*. The crown will not grant a fair and market without a writ of *ad quod damnum*; and if it do, the owner of another market may bring an action or *scire facias* against the grantee, and the argument must conclude, *à fortiori*, against a mere wrongdoer, rather than against the person colourably claiming under a grant from the crown. Upon these authorities, we are of opinion that the plaintiff is entitled to recover.

(a) 5 B. & C. 363.

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a reasonable regard to his own safety, place himself in the market, and sell his goods there. The evidence shewed that the market was very much crowded, and that the stalls were frequently knocked down by carriages. The market-place was not only inconvenient but dangerous. Here the plaintiff being lord of the manor, which was co-extensive with the township, might have held the market in any place within the township. Then as to whether the lord has a right to prevent a man from selling in his own private house? It may be questionable whether any such right can exist in point of law. This is distinguishable from the *Prior of Dunstable's* case (a), for there, another market was set up. That case only establishes that if there be a grant of a market in one part of a town, the inhabitants of another part cannot erect a new market, and there sell their goods, because that is to the damage of the lord of the market. In most of the cases the lord was deprived of his toll. That appears to have been so in the *Dorking Market* case, from the observations made upon it by Lord Ellenborough in the *Bailiffs of Tewkesbury v. Diston* (b). [Lord Tenterden C. J. Lord Ellenborough must have meant stallage: it was not necessary for him to distinguish toll from stallage.] Toll is not incident to a market, but the subject of specific grant; stallage is derived from the right to the soil, and so is pickage. In *Com. Dig., tit. Market, (F) 2.*, this is laid down: "The owner of a house next to a fair or market cannot open his shop for selling in a market, without payment of stallage; for if he takes the benefit of the market, he ought to pay the duties there." This is said to have

(a) 11 H. 6. 19 a.

(b) 6 East, 438.

been so ruled by the Court in the *Newington Fair* case, contrary to the opinion of *Doddridge J.* In *Vin. Abr.*, tit. *Market*, it is said, "If a person has a shop near a fair or market, he may sell there, on payment of stallage, but not otherwise." In the *Dorking Market* case, referred to in *The Bailiffs of Tewkesbury v. Bricknell (a)*, it appeared that a man had fitted up an inner room in a public-house, and pitched and sold corn there, not merely his own corn, but that of others. That was setting up another market. It by no means follows from the nature of a grant of a market, that the lord shall have a right to prevent others from selling in their own private houses in or near the market; and although a private person may have the right to sell in his own house a commodity usually sold in the market, he cannot, therefore, set up another market. Now it is a great benefit to a grantee to have a right of market in a place where another cannot interfere with him. The plaintiff does not complain that the defendant set up another market, but merely that he sold goods in his own house. In the *Prior of Dunstable's* case the defendant was charged with procuring other persons to sell in his own house. That was setting up another market, and in that respect it resembled the case of the *Dorking Market*.

Lord TENTERDEN C. J. I am of opinion that this rule ought to be discharged. We are not called upon, on the present occasion, to lay down as a general rule and principle of law, that the grant of a market for the

(a) 2 Taunt. 133.

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sale of certain things necessarily carries with it an exclusion of the right of sale of similar commodities in a private house, whether the market is convenient or not, because, admitting it to have been a question of fact, whether the lord of the market had that exclusive right on the present occasion, the evidence abundantly shows that Sir *Oswald Moseley* had that right; and the verdict of the jury, given upon that evidence, decided the question of fact, which was distinctly left to them. Indeed it is a most extraordinary circumstance, that in such a populous town as *Manchester* the defendant should not have been able to prove half a dozen instances of shops having been continually open for the sale of fish. The want of such a convenience in such a place as *Manchester* appears to me abundantly to shew that the exclusive right of the lord must have been known and recognized.

Another point made was as to the insufficiency and inconvenience of the market itself, in the place where it is holden. As to that insufficiency, the defendant has no ground of complaint, for he had a stall which he might have used, at the time when he sold fish in his private house. As to its inconvenience, it appears that the market is holden in that place where in ancient time it had been holden; not in a place convenient for a market certainly, but in the public street, where most ancient markets were held. In modern times many market places or houses have been built adjoining to or a little way removed from the street, but formerly all markets were holden in the public streets. And if the ancient market has been held in the public street, can we say that because population and commerce have increased,

increased, and that a greater number of carriages pass through the street in modern times than passed in ancient times, the lord, therefore, is to lose his franchise? If, indeed, it could have been proved that any complaint or remonstrance had been made to the lord on the subject, as he has the power to hold the market in any part of *Manchester*, he being the lord of the manor and owner of the soil; and that after complaint and remonstrance on the part of persons frequenting the market, he had persisted to hold the market in this place when he might have holden it elsewhere, there might have been some foundation for the argument addressed to us on the part of the defendant, but in the absence of any such proof, I think that the Court ought to maintain this ancient right; for as a general rule, I think that all ancient rights and ancient establishments ought to be upheld by us, as far as by law they may. Upon the whole, I am of opinion the rule must be discharged.

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BARREY J. The only doubt which I have entertained as to any part of this case related to the right claimed by Sir *Oswald Mosley* to exclude all persons from selling in their own houses such commodities as were usually sold in the market. The case of *Mosley v. Chadwick* does not, as it seems to me, advance the argument upon that point. It was there decided, that the lord, having a right of market in a particular place, a stranger could not lawfully set up what in reality was a different market in that place. But the exclusive right claimed may by law exist, and the question was, whether upon the evidence the franchise of the plaintiff en-

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v. Aldermen
of Manchester.

titled him to that exclusive right. Of that there was abundant evidence, for where there is a grant of a franchise, the exercise of the right under the grant is evidence of the nature and extent of the right of the grantee. Generally speaking, where a market is granted to a particular individual, he may either permit every place within the specified limits of the market to be the place where articles may be sold, or he may, if he thinks fit, fix upon a particular place within which the sale shall take place; and he may say that different places shall be appropriated to the sale of different articles; and he may, in the first instance, if he thinks fit, exclude every private house, and prevent the owner from selling within that private house any of those articles. But then it is always a question of fact whether there has been in the particular instance such an exclusion or not, and such an appropriation of a particular place. In this case it did at first appear singular, that, in so large a place as *Manchester*, fish and butcher's meat should be excluded from sale in private houses. The evidence in the cause was however sufficient to show that there had been in fact such an exclusion, and the authorities establish that by law such an exclusion may take place. The case of the *Prior of Dunstable* is an ancient authority on that point, and it is recognised by Lord C. B. *Comyn* in his *Digest*, tit. *Market*. In *Curwen v. Salfield* (a) it was decided, that the lord of a market might determine in what part of the township it should be held, and might shift it from place to place, or confine the right of holding the market to a particular place. Now if he has a right to confine it to a

(a) 3 East, 538.

particular place, he may exclude every private house, and require that every person shall cease to sell or expose his wares for sale, except within those limits in which he determines that they shall be sold or exposed for sale, and subject them to such burdens and such examination as other articles exposed to sale within those limits are subject to. Then if that point be removed, the only question is, Was there or was there not negligence on the part of the lord in not providing better accommodation for persons from time to time resorting to the market? I take it to be implied in the terms in which a market is granted, that the grantee, if he confine it to particular parts within a town, shall fix it in such parts as will from time to time yield to the public reasonable accommodation; and that if the place once allotted ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it; or if not, to get land from other people in order that the market which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held; and that the public may have the benefit which it was originally intended they should derive from it. That was a question for the jury, and in this case it appears to have been left fairly and properly to them. Whether I might have come to the same conclusion is a different question; but the jury having the matter left to their consideration, found that no blame was imputable to the lord of the manor in this respect.

HONORABLE J. I am also of the same opinion. I think both those points were properly left to the jury, and I

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cannot say that they have come to a wrong conclusion so as to authorise us to set aside the verdict. If the question in this case had been, whether, where the lord has a right to a market, it follows as a necessary consequence of law resulting from such right, that he may prevent persons, being inhabitants of the place, from selling in private houses, I, for one, should have hesitated before I acceded to that proposition; but I think such a right may exist, wherever there is an ancient right to a market either by grant or prescription. I am bound to say that the right may exist in law so as to go to the exclusion of others. The King may grant a right of market at the present day in case it is beneficial to the public. But where the King grants a new right of market for butcher-meat or fish in a place where there are persons carrying on the trade of a butcher or fishmonger, it by no means follows that the grantee can compel them to come to the market, and to desert their ancient mode of carrying on their trade. I feel a great difficulty in saying that it follows as a consequence of law, that in such a case the lord, having a right of market, may or can compel persons who are inhabitants of the place to come to his market. The question whether he could do so must depend upon the fact, whether the market be an ancient market. If the market be an ancient market, and the lord at all times appears to have prevented a sale in private houses, the exercise of such a controul is evidence of the right. I think in this case the evidence established such a right.

Rule discharged.

On

On moving for the rule, *Brougham* intimated that he should also move in arrest of judgment, on the ground, that by an old statute (a), the holding of a market on certain feast-days (*Ascension-day* and *Good Friday*) was prohibited; and that all the counts in this declaration alleged the market to be held on certain specified days in the week, without any exception as to those feasts. But *Patteson* now admitted, that the case of *Comyns v. Boyer* (b) was an authority to shew, that where the law raises the exception it need not be stated in pleading.

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(a) 27 Hen. 6. c. 5.

(b) Cro. Eliz. 485.

RIGBY and Others, Assignees of T. W. WIL-
LIAMS, against OKELL and Others.

Monday,
June 25th.

THIS was an action of trover brought to recover three barges, being the property of the bankrupt before his bankruptcy, but which had been conveyed to the defendants by a deed which the plaintiffs contended to be fraudulent for undue preference. At the Summer assizes for the county of *Chester*, 1826, the defendants obtained a verdict. In the *Michaelmas* term following a rule nisi for a new trial was obtained, and the parties agreed to refer the cause to a barrister. By the submission he was empowered to vacate the verdict, or to order the suit to be prosecuted as he should think fit. The costs of the cause were left in his discretion. The

A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was referred to a barrister, and the costs of the cause were to be in his discretion. He found that the plaintiffs were entitled to recover, and ordered the defendants to pay the costs of the cause: Held, that the plaintiffs were

not entitled to the costs of the first trial.

arbitrator

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 against
 Counsel

arbitrator by his award found that the deed was an undue preference, and void as against the creditors of the bankrupt, and that the barges were the property of the plaintiffs as assignees; and he directed the defendants forthwith to deliver to the plaintiffs the possession of such property, and to pay the costs of the cause, to be taxed by the proper officer of this Court. The Master refused to allow any costs to the plaintiffs beyond the period when the issue was joined between the parties. A rule nisi had been obtained for the Master to review his taxation.

Cottingham now shewed cause. If the rule for a new trial had been made absolute, and the plaintiffs had obtained a verdict upon a second trial, they would not have been entitled to the costs of the former trial, *Austen v. Gibbs* (a). The arbitrator by his award has not vacated the verdict, but merely ordered the defendants to pay the costs of the cause to be taxed by the proper officer. He must be taken to mean such costs as the defendants would have been liable to pay if the plaintiffs had succeeded on a second trial.

Coltman contra. By the submission the costs were to be in the discretion of the arbitrator, and he has awarded that they should be paid by the defendants; and although the plaintiffs would not have been entitled to the costs of the first trial if they had succeeded upon a second, yet as the parties expressly agreed to leave all costs in the discretion of the arbitrator, and he has exercised that discretion, and directed them to be paid

(a) 8 T. R. 619.

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by the defendants, the latter are bound by the submission to pay them.

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Lord TENTERDEN C.J. We must understand *the costs of the cause* in that sense in which they would have been understood if there had been no reference, but a new trial, and the verdict upon such second trial, different from what it had been on the first trial. Now, where a verdict is on the first trial found for the defendant, and on a second for the plaintiff, the latter is not entitled to the costs of the first trial. I think that the arbitrator, when by his award he directed the defendants to pay the costs of the cause, must be understood to have intended those costs of the cause which the defendants would have been liable to pay if the cause had been tried a second time, and a verdict had been found for the plaintiffs. This rule must therefore be discharged.

Rule discharged.

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Wednesday,
June 27th.

The KING against Gosse.

Where only one of several partners was resident in a parish: Held, that he could not be rated to the relief of the poor in respect of more than his share of the partnership personal property.

UPON an appeal against a poor rate made for the parish of *St. James*, in *Poole*, the sessions confirmed the rate, subject to the opinion of this Court upon a case which stated that *Gosse* and two other persons carried on business in partnership in the parish of *St. James*, in *Poole*. *Gosse* was the only partner resident in the parish, and he was rated in respect of the whole of the partnership personal property, in which he and his co-partners were equally interested, and not in respect of his third share only.

The *Solicitor-General*, *Brougham*, and *W. D. Bayley* contended, that this case was distinguishable from *Rex v. North Curry* (a), where none of the partners was resident in the parish; and from *Rex v. Fryer* (b), where all the partners were rated, although one only was resident. Here *Gosse* has an undivided interest in the whole of the property, and may therefore be rated in respect of it. The overseers would have great difficulty in ascertaining the quantity of interest in each of several partners.

The *Attorney-General* and *Parke*, contra, were stopped by the Court.

(a) 4 B. & C. 953.

(b) 4 B. & C. 961. n.

LORD TENTERDEN C. J. It is clear that this rate must be amended. By the statute 43 *Elix. c. 2.*, *inhabitants* are to be rated according to their ability. If this rate were to stand, *Gosse* would be rated according to the ability of himself and others. It is said that there will be difficulty in ascertaining the share to which any partner may be entitled; but where that is the case the rate may easily be imposed in respect of the whole, and the party may come and discharge himself by proving the extent of his interest.

Rule absolute for amending the rate.

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against
Gosse.

- in Re. v. The Comrs for Lighting, Heating, &c. of the Parish of St. James, &c. of Liverpool - 9 ad ill 435
Re. v. The Mayor &c. of Liverpool - 7 Ad. & C. 70, n. 1 (c)

The KING against The Inhabitants of the Parish Wednesday,
June 27th.

of LIVERPOOL.

Regina v. Radcock - 6 ad ill 707. n. 1.

BY a rate for the relief of the poor of the parish of *Liverpool*, in the county of *Lancaster*, made 21st July 1825, and duly published and allowed, the trustees of the docks and harbour of *Liverpool* were assessed in the sum of 50,953*l.*, in respect of the annual value and profits of the dock estates within the said parish, vested in them as trustees of the said docks and harbours, according to the following schedule :

On the dock duties	-	-	£ 50,000
On three cranes at the new wall and the			
parade slip	-	-	40
Engine-house, <i>Bridge Street</i>	-	-	17

keep the dock, &c. in repair: Held, that the Dock Company were not rateable to the relief of the poor in respect of the dock dues received by them, nor of the premises purchased or hired, and used by them for the purposes of the dock, no individual having any beneficial occupation of those premises.

Where, by act of parliament, certain persons were empowered to make a dock, and take certain rates and duties from ships resorting to it, and the same statute provided that those rates should be applied to paying off the debt incurred in making the dock, and to keeping it in repair, and that then the rates should be lowered, reserving sufficient to

Office,

Governors of the Bristol Dock v. Wm. 5 ad ill. 1.
Regina v. Wallingford Union - 10 ad ill. 209
Regina v. Badcock - 6 ad ill 707. n. 1.

1827, 1828, <hr/> The King against The Inhabit- ants of Liverpool	Office, Salthouse dock	-	-	-	23
	Ditto King's dock	-	-	-	26
	On office, Queen's dock	-	-	-	26
	Ditto Bridge Street	-	-	-	54
	Ditto Old dock	-	-	-	270
	Ditto Gorse	-	-	-	11
	Ditto yard, &c. Trektham Street	-	-	-	185
	Ditto - - - Ditto	-	-	-	315

Against this assessment the trustees appealed to the Court of Quarter Sessions of the borough of *Liverpool*, upon the ground that the dock estates within the said parish are not rateable to the poor thereof. The Court being of opinion that the trustees were not rateable, amended the rate, by striking out the foregoing assessment, subject to the opinion of this Court upon the following case. The dock estates within the parish of *Liverpool* are vested in the mayor, aldermen, bailiffs, and common council of *Liverpool*, as trustees of the docks and harbour of *Liverpool*, by virtue of several acts of parliament (viz. 8 *Anne*, c. 12., 3 *G. 1.* and 11 *G. 2.* c. 32., 2 *G. 3.* c. 86., 25 *G. 3.* c. 15., 39 *G. 3.* c. 59., and 51 *G. 3.* c. 143., all of which, excepting the second, are public acts,) and consist of a large quantity of land, to the extent of 100 acres. Part of those estates was granted voluntarily by the corporation of *Liverpool*, part was sold by that body to the trustees for a pecuniary consideration, and other parts have been purchased by the trustees from private individuals, according to the powers given to them by the said acts. Before the construction of the present works part of the land was waste, both above and below high-water mark, but other parts consisted of lands and buildings in the occupation of

of individuals rated to the relief of the poor of the said parish.

The dock estates at present consist of several wet docks, in which vessels may be constantly afloat, dry basins, that is to say, dry at low water, wharfs, piers, slips, cranes, weighing machines, offices, and yards for storing goods, and other conveniences requisite to form a complete dock; and the trustees are authorized to receive large sums, under the name of dock rates and duties, for the accommodation of vessels in the said docks, by virtue of the said acts of parliament.

The trustees manage the dock estates by their servants and agents, who receive and account to them for the dues and profits arising as aforesaid, and no part of the estates and premises above assessed is let off to other persons.

With regard to the application of the monies received as dock duties, it is enacted, by the 8 *Anne*, c. 12. s. 9., above referred to, under which the first dock was built, "that all and every such sum and sums of money that shall be raised and received by the duties aforesaid, after payment of the expenses of collection, shall be, by the trustees for the time being, applied and disposed of to the building and repairing the said new dock or basin, and other works, and for the securing, preserving, and maintaining the said dock or basin and harbour of *Liverpool*, and to no other use and purpose whatsoever." By the same section the collector of the dock duties is required to keep accurate accounts of all his receipts and disbursements.

By the fifteenth section of the same act nine commissioners are appointed for the inspection of the accounts, which commissioners "shall and may order
and

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and appoint all such monies which shall rest due upon such account to be laid out and expended to and for the uses and purposes in the act mentioned, and to and for no other use whatsoever."

By the fourth section of the 11 G. 2. c. 32., passed for building another dock, it is enacted, "that there shall be twelve commissioners to inspect, audit, and adjust the account of all the collectors' receipts and disbursements of all the monies collected and levied by virtue of the former act and that act, who shall be invested with such and the same powers and authorities in all respects, and to all intents, constructions, and purposes, as were given to and vested in the commissioners appointed in pursuance of the former acts, or either of them."

By the 51 G. 3. c. 143. s. 125., the mode of appointing the commissioners is altered, but the electors are authorised to appoint them as commissioners, for the purposes in this and the former acts mentioned.

By the 11 G. 2. c. 32. s. 8., all the collectors of dock duties are required to keep regular accounts of their receipts and disbursements, and to produce the same to the commissioners when ordered; and by the ninth section of the same act, the treasurer of the dock duties is required to print his account yearly, the expense of such printing to be deducted out of the dock duties, and to deliver a copy to any such person paying dock duties as shall require the same.

All the dock rates payable by the former acts of parliament were repealed by the 51 G. 3. c. 143., which imposed the present duties. The twenty-seventh section of that act, which relates to the application of the present dock duties, is as follows: "And be it further enacted,

that

that all monies which shall be collected, received, levied, borrowed, and raised by and under this act, shall be applied in paying and defraying the charges and expenses attending the obtaining and passing this present act, and to the paying the expenses and charges attending the levying and collecting the said rates and duties; and after the paying and appropriating one third part of the said monies, to and for the purpose of making and completing the southernmost of the north docks as hereinafter is mentioned, then to the paying off and discharging the present bond debt of 114,705*l.* 19*s.* 4*d.*, and the debt of 67,406*l.* 18*s.* 7*d.* owing by the trustees to the corporation of *Liverpool*, for the purchase of land and strand intended for the site of the southernmost of the two northern docks, and any future bond debt, and the interest on the same; and to the paying and discharging the interest on all other monies which may be hereafter borrowed and taken up at interest under the provisions of this act upon the credit of the dock rates and duties as aforesaid, and to the carrying into execution the purposes of this act and the said recited acts, in the making, erecting, building, finishing, and maintaining such docks, basins, piers, and other works and buildings in the port of *Liverpool*, under the said acts and this act, and to the paying, defraying, and satisfying all other charges and expenses already incurred, or hereafter to be incurred in the carrying into execution, or under or in consequence of any of the former acts or this present act; and the residue or surplus of all monies arising from such rates or duties, which shall remain after such application thereof as aforesaid, shall from time to time be applied in or towards the repayment of the principal monies which shall have been

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borrowed under this act, until all such principal monies shall be repaid, and all assignments of or mortgages upon such rates and duties are paid off, satisfied, discharged, and redeemed; and when, by the means last mentioned, all the principal monies which shall have been borrowed shall be repaid, and all assignments and mortgages upon the said rates are satisfied and redeemed, then and in such case it shall be lawful for the trustees, and they are hereby required to lower and reduce the rates and duties hereby granted and made payable as far as the same can be done in the then state of the docks, basins, buildings, and other works and buildings of the said port, and leaving sufficient for all charges of management and collection of rates and other concerns of the said docks, basins, piers, works, and other buildings, and improving, repairing, and maintaining the same, and for carrying into execution the provisions of the former acts and this act." The present duties have been invariably applied by the trustees according to the direction of the last-mentioned section, and they derive no private advantage or emolument whatsoever from the execution of the trusts of the dock estates.

The three cranes mentioned in the schedule were erected by the trustees out of the dock funds, in pursuance of the power given them by the 78th section of the 51 G. 3. c. 143., before referred to. For the use of these cranes in landing and discharging cargoes, the trustees charge a certain sum, which goes to the general dock estate in the same way as the dock duties, and is applied as the general dock funds are and must be applied by the various acts of parliament, and the trustees derive no individual benefit from them.

The engine-house is used for the purpose of keeping
a fire-

a fire-engine, which the trustees have provided out of the public funds, for the security of the shipping, as empowered by the same section, and no rent is charged to or paid by any one for the same.

Of the different offices enumerated in the schedule some are for the accommodation of the dock masters and gate-men at the various docks, as places of shelter, and merely for the dispatch of public business; others are occupied by the collector of the dock rates, the harbour-master, and other public officers of the trustees, solely for the purposes of the dock business. No rent is charged to them for the use of these offices, and no part of them is occupied as a residence by any one.

The two yards mentioned in the schedule are hired by the trustees at an annual rent, as a place necessary for the deposit of the various articles used in the erection and maintenance of the docks, and from the occupation of which they derive no personal benefit.

The *Solicitor-General* and *Gregson* in support of the order of sessions. By the several statutes set out in the case the funds of the dock company are appropriated entirely to public purposes. There is not therefore, by any individuals, any beneficial occupation of the property in respect of which the rate was imposed upon the trustees. The case in this respect differs from *Rex v. Agar* (a), but cannot be distinguished from *Rex v. The Commissioners of Salters-load-sluiice* (b). In *Rex v. Terratt* (c) Lord *Ellenborough* says, "The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building, or other subject of the rate, as a mere servant of the crown, or of any public

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(a) 14 East, 256.

(b) 4 T. R. 730.

(c) 3 East, 513.

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body, or in any other respect, for the mere exercise of public duty therein, and have no beneficial occupation of, or emolument resulting from it, in any personal and private respect, then he is not rateable." And he afterwards assigns this reason for the rule: "The occupation is throughout that of the public, and of which public occupation the individuals are only the means and instruments." The case of *Lord Amherst v. Lord Somers* (a) was decided on the same grounds. In *Rex v. The Hull Dock Company* (b), where they were held rateable, *Holroyd J.* says, "If under the section requiring the company to repair the dock and other works, the specific rates had been, so far as they were required, appropriated to that purpose only, I should have entertained considerable doubt whether any property vested in the trustees which could properly be made the subject of rate, beyond the surplus which might happen to remain in their hands after satisfying the expenses attending the maintenance and repair of the works." Here the trustees never can legally have a surplus, for as soon as certain objects specified in the acts are answered, the rates are directed to be lowered.

The *Attorney-General* and *J. Williams* contra. The property in question is in its nature rateable, and is, therefore, liable to be rated, whether productive of profit or not, *Rex v. Parrott* (c). Nor does it make any difference that the rates are received by trustees, for in *Rex v. Agar* the trustees of a meeting-house were rated. [Lord *Tenterden* C. J. If in that case there had been no intervention of trustees, and the minister had been

(a) 2 T. R. 372.

(b) 5 M. & S. 402.

(c) 5 T. R. 693.

in the receipt of the poor rents, he would have been rateable in respect of them.] It may be true that the trustees in this case derive no peculiar benefit from the docks, but they belong to the corporation of *Liverpool*, who are possessed of much property, and in order to improve that, they obtained power to make the docks. The expense of those works is to be defrayed by the rates, which are, therefore, expended in improving the private property of the corporation. No doubt the public are benefited, but that is no ground for exempting property from poor rates, if there is also a private benefit. But supposing the argument on the other side to be correct as to the main question, still the last two items of the rate are good, for they are in respect of premises rented by the corporation. Suppose the trustees rented a farm in order to pay their labourers in corn or other produce, that would clearly be rateable, and the rate upon the premises in question must be governed by the same principle.

Lord TENTERDEN C. J. I am of opinion that the order of sessions must be confirmed. It seems to me that there is no solid ground for the distinction which has been taken as to those parts of the property rated which are rented by the dock company, for if there be no beneficial occupation it can make no difference whether the occupier be the owner or not. As to the main question, the case of *Rez v. The Commissioners of Salters-load-shuice* is decisive. There the tolls were by act of parliament directed to be applied "to the purposes of the act, and to and for no other use or purpose whatsoever." The statute under which the dock rates in question are levied does not indeed contain an ex-

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press direction that the rates shall be applied to the purposes specified, and no other; but it directs that certain burdens shall be discharged, and that then the rates shall be lowered; and, therefore, any application of those rates to other purposes not specified, would be a direct violation of the statute. Nothing of that kind is suggested, and, therefore, there is not in reality any difference between this case and the former. The principle of not rating property of which no person has a beneficial occupation is not confined to canals or docks, or property of that nature. A Quaker's meeting-house, if the pews are not let, is not rateable, as was decided in *Rex v. Woodward (a)*, and the same would be applicable to a chapel with the rites of the church of *England*, or to a dissenting meeting-house. On the other hand, it was held in *Rex v. Agar*, that where the pews of such a meeting-house were let, the trustees were rateable in respect of the rents, although not received to their own use, but for the benefit of the minister. Here the trustees were not occupiers in the ordinary sense of the word, and no profit was received for the use of any person. It is said that the docks were made by the corporation of *Liverpool*, in order to improve their private property; if such an effect is produced, that property will be rateable for the improved value.

BAYLEY and LITLEDALE Js. concurred (b).

Order of sessions confirmed (c).

(a) 5 T. R. 79.

(b) *Holroyd J.* was in the Bail Court during the argument, and therefore gave no opinion.

(c) The following case, *The King v. The Trustees of the River Weaver Navigation*, was argued at the sittings in banc. before this term:—

Where the surplus tolls of a navigation were

Upon an appeal against a rate made by the overseers of the poor of the township of *Moulton*, in the county of *Chester*, upon the trustees of the river

river *Weaver* navigation, the sessions confirmed the rate, subject to the opinion of this Court on the following case : —

By an act of parliament passed 7 G. 1., entitled " An act for making the river *Weaver* navigable from *Frodsham Bridge* to *Winsford Bridge* in the county of *Chester*," it was enacted, " That from and after the said work shall be finished, and all the charges thereof, &c. fully paid, that then the clear produce of the rates and duties shall, from time to time, be employed for and towards amending and repairing the public bridges within the county of *Chester*, and such other public charges upon the county, and in such manner as the justices of the peace at the *Michaelmas* quarter sessions shall yearly order, direct, and appoint." And after reciting that the roads leading to the river would be much injured by the increased traffic upon them, it was also provided, that so much of the rates as the justices might think fit should be expended in repairing those roads, and that if any surplus remained, it should be expended in repairing such other highways in the county as the justices in sessions should appoint. By the 33 G. 2. further provisions as to the navigation were made, but it directed that the surplus duties, after payment of the expenses of the navigation, should be applied to such public purposes as before mentioned.

The tonnage rates and duties upon the *Weaver* are not charged by the mile, but 1*s.* per ton is charged upon the whole line of river; and a vessel navigating the whole or any part of the length of the said navigation is subject to the same charge. This tonnage is paid quarterly at the river *Weaver* navigation office in *Northwich*, which is a distinct township from *Moulton*. The annual accounts up to the 5th of *April* in each year are regularly audited by the clerk of the peace, and filed at the *Michaelmas* quarter sessions, when the balance arising from the rates and duties in the hands of the treasurer, over and above the necessary charges and expenses for the maintenance and support of the navigation, is directed by the magistrates there assembled to be paid, and the same is invariably paid to the county treasurer, to be applied for the general purposes of the county, according to the acts of parliament, and to none others. The township of *Moulton* rated the trustees as follows : —

OCCUPIERS.	PROPERTY RATED.	RENTAL.	SUM ASSESSED.
		£. s. d.	£. s. d.
The trustees of the river <i>Weaver</i> navigation.	Lands used for the river <i>Weaver</i> , with the tolls, dues, and duties arising therefrom, or in respect thereof, within the township of <i>Moulton</i> .	234 13 4	35 4 0

The amount at which the trustees are assessed in the said rate, provided they are rateable at all, is correct.

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directed by act of parliament to be expended in repairing public bridges and highways : Held, that they were not rateable to the relief of the poor.

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Alderson, Brown, and Trafford, in support of the order of sessions. The only doubt is, whether the trustees of the river *Weaver* have a beneficial occupation. It is not necessary that they should enjoy the benefit, for provided benefit accrues to any person, that is sufficient to make the property rateable. For the purposes of this question, the trustee and the cestui que trust are identified. Thus in *Rex v. Agar*, 14 East, 256., the trustees of a Methodist meeting-house were held to be rateable for the pew-rents, although the whole surplus, after payment of the current expenses, was paid over to the officiating ministers. But it will perhaps be said, that the surplus profits in this case are to be applied to public purposes. They are, indeed, to be applied to the public purposes of the county, and will therefore go in aid of the county rate, and confer a benefit upon every landholder in the county. Each landholder, therefore, derives a private benefit from these tolls. The principle of exempting from liability to poor-rate monies to be expended for public purposes does not apply, unless the benefit is conferred upon the whole public of the kingdom. *Rex v. Salters-load- sluice*, 4 T. R. 730., and *Rex v. Scalcoates*, 12 East, 40., may be cited on the other side, but they are distinguishable. In the former, the whole of the money received was to be applied to the purpose of draining the lands adjoining the navigation. Those lands would be rateable for the improved value, and, therefore, if the money had been rateable in the hands of the commissioners, it would, in effect, have been liable to a double rate. In the latter case, no person derived any benefit within the parish from the lands used for the purposes of the drainage.

Nolan and Cottingham contra. The trustees are not rateable unless they have a beneficial occupation of the land in some private and personal respect, *Rex v. Terrott*, 3 East, 506. In this case, it does not appear that the trustees have any right in the land: the statutes set out do not vest the soil in them, and the tolls are payable for the right of passage only, and not for the use of land, and, therefore, are not rateable. Thus tolls of a ferry are not rateable, *Rex v. Nicholson*, 12 East, 330., *Williams v. Jones*, 16. 346.; nor market-tolls not incident to the soil, *Rex v. Bell*, 5 M. & 3. 221.; nor tolls paid in respect of a lighthouse, *Rex v. Tyne-mouth*, 12 East, 46., *Rex v. Coke*, 5 B. & C. 796., *Rex v. Foulke*, 16. 814. But supposing these tolls to be connected with the occupation of land, still they are not rateable, inasmuch as the legislature has directed that they shall be applied wholly to public purposes. Upon this point it is impossible to distinguish the present case from *Rex v. Salters-load-sluice* and *Rex v. Scalcoates*. In *Rex v. Agar* it appeared that the pew-rents were received by the trustees for private purposes, although not for their own peculiar benefit.

BAYLEY J. We are not under the necessity of deciding this latter point; for we think, that, as there is not any clause in the statutes set out which

which vests the soil of the river *Weaver* in the trustees, they cannot be rateable to the relief of the poor in respect of the tolls.

It was then suggested that the trustees were rated in several parishes through which the river *Weaver* runs, and that in some of them they might be considered as the occupiers of land, it was therefore important to have the opinion of the Court as to their liability to be rated under such circumstances. Upon this point, the Court deferred their judgment until the case of *Rea v. The Inhabitants of Liverpool* had been decided; and then

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BATLEY J. said, The principle of this decision is applicable to the case of *Rea v. The Trustees of the River Weaver Navigation*. There the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. These were public purposes; and as no part of the monies received could be applied to private purposes, those monies were not rateable in the hands of the trustees. The order confirming the rate must therefore be quashed upon this ground, as well as that which was mentioned by the Court at the time of the argument.

Order of sessions quashed.

SHAW and Others, Assignees of E. HOWARD and J. GIBBS, against WOODCOCK. *Friday, June 29th.*

(In Error.)

THIS was an action for money had and received, brought by *Woodcock*, the plaintiff below, to recover from *Shaw* and others, the defendants below, the sum of £1000, and of which he cannot otherwise obtain possession at the time, is a compulsory, and not a voluntary payment, and may be recovered back.

The agent for the grantee of several annuities delivered him four accounts in the course of eight months, and gave him credit for all the half-yearly instalments of the several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, and paid the balance of the accounts as if they had been received, and in the later accounts never brought forward those sums, nor intimated that he expected them to be repaid. Held, upon a bill of exceptions, that upon this evidence the jury were properly told by the Judge, that they might infer an agreement whereby the agent made himself personally responsible for the payment of those annuity-instalments in default of payment by the grantors.

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assignees of *Howard* and *Gibbs*, bankrupts, the sum of 715*l.* 5*s.* 7*d.*, paid to them by the plaintiff below, in order to obtain possession of certain policies of insurance belonging to him, and upon which the assignees claimed a lien to that amount, and which they refused to deliver up until that sum was paid. The bankrupts acted as the agents of the plaintiff for the purpose of receiving instalments of annuities due to him, and charged him a commission for so doing, and from time to time rendered him accounts of all sums paid or received for him. In the accounts delivered they from time to time gave credit for several instalments of annuities due, but which were not received, and were so described in the accounts, but they paid him the balance of those accounts as if all the instalments had been received. In the succeeding accounts no notice was ever taken of the instalments which, in the preceding accounts, had been marked as not then received. At the trial, at the *London* sittings after *Hilary* term 1825, before *Best* C. J. of the Court of Common Pleas, the jury, under his direction (to which a bill of exceptions was tendered), found a verdict for the plaintiff below. The record, when brought into this court by writ of error, after setting out the pleadings and continuances, stated, that on a certain day the cause came on to be tried, and that one *J. Hindman* was produced and examined as a witness for the plaintiff, and gave the following evidence: — In the year 1822 he had been, and still was, the attorney for the plaintiff. The defendants, as assignees of the estate and effects of *Howard* and *Gibbs*, had been in possession of certain policies of insurance belonging to the plaintiff, which had been effected on the joint lives of one

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Gowland and his wife. He, the witness, in the early part of the said year, and soon after the death of *Gowland*, had applied to the defendants to deliver up the policies of insurance, but they claimed from the plaintiff a sum of 715*l.* 5*s.* 7*d.* as assignees of *Howard* and *Gibbs*, and claimed a lien upon the policies for that sum. *Hindman*, as the attorney for and on the behalf of the plaintiff, paid to the defendants, in order to get the policies out of their hands, the sum of 715*l.* 5*s.* 7*d.*, the balance so claimed, but which he, the witness, denied to be due. It was a disputed account; and he was obliged to pay the money before they would deliver the policies. At the time when he paid the 715*l.* 5*s.* 7*d.* he gave to the defendants a notice in writing, signed by *Woodcock*, stating, "that he had paid to the assignees 715*l.* 5*s.* 7*d.* for which they claimed a lien on the policies, his (*Woodcock's*) property, in order to obtain possession of such policies, and on no other account; and that by such payment to them he did not mean to admit that they were entitled to a lien to such amount, or to any amount on the said policies; and that he (*Woodcock*) should bring an action against them, to recover back the said sum of 715*l.* 5*s.* 7*d.*" The witness then produced certain paper writings, in the hand-writing of *Gibbs*, one of the bankrupts, which writings the witness had received from *Woodcock*. The first was an account, which contained a statement of transactions between *Woodcock* and the bankrupts, from *December* 1818 to *March* 17th 1819. *Woodcock* was there debited with various sums of money paid on his account for insurance on lives and for cash paid, and for commission on all the annuity instalments then due, and stamps. He was credited with various sums

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due to him on account of annuities, and among others, with "50*l.*, one half year's annuity due from *B. Sydenham*, not yet received;" and 14*l.* 5*s.*, another half year's annuity, "due from *R. S. Gotland*, not received;" and the balance due to *Woodcock* was in the account stated to be 94*l.* 5*s.* 9*d.* This account was sent to *Woodcock*, inclosed in a letter from *Gibbs*, dated the 17th *March* 1819, and in which he stated that he had not received either *Gotland's* or *Sydenham's* annuity, but that he would accept *Woodcock's* bill at two months after date, for the balance of the account. The second account was delivered on the 23d. of *October* 1819, and contained statements of money transactions between the parties, from the 17th of *March* 1819 to 17th *September*. *Woodcock* was debited with various sums paid on his account, with commission on annuity instalments then due, and he was credited with several sums received, and with 50*l.*, one half year's annuity due from *B. Sydenham*, 9th of *September*, and 83*l.* 10*s.*, a half year's annuity due from one *Cunliff*, 17th of *May*. These two instalments were marked as not received, and the balance due to him was stated to be 107*l.* 16*s.* 3*d.* This account was also inclosed in a letter from *Gibbs*, in which he stated that he had included all the annuities, though not received, and added, if he (*Woodcock*) felt the necessity of drawing, he was to let him (*Gibbs*) know. The third account contained a statement of money paid and received on account of *Woodcock*, from *January* to the 23d of *February* 1820. *Woodcock* was, as before, debited with various sums of money paid on his account, with commission on the annuity instalments then due, and credited with 83*l.* 10*s.*,

one

one half year's annuity due from one *Cunliff*, but which was stated to be not yet received, and the balance due to him upon that account was 56*l.* 4*s.* 7*d.*; and *Gibbs* in his letter inclosing the account stated, that although half a year's annuity, with which *Woodcock* was credited, was not received, he might draw for the balance. The fourth account was transmitted on the 25th November 1820, inclosed in a letter from *Gibbs*. It contained an account of money transactions between the parties, from the 4th of April to the 24th November 1820. In that account *Woodcock* was debited with various sums paid on his account, with commission on all the half-yearly instalments of annuities then due, and credited with several sums due to him on account of half-yearly payments of annuities; but two of these half-yearly instalments, viz. one for 100*l.* due from *B. Sydenham*, 9th of September, and 167*l.* another due from *Cunliff* 17th of November, were stated to be not yet received. These two instalments were given credit for on the 4th of November and the balance due to *Woodcock* was stated to be 56*l.* 4*s.* 7*d.* *Gibbs* transmitted this account to *Woodcock* by a letter dated the 23d of February 1820. The instalments on the half-yearly annuities, which were stated as not received, were not placed to the credit of *Woodcock* on the days when they respectively became due, but on subsequent days, and in some instances credit was given generally without date. No evidence being produced on the part of the defendants, the Chief Justice declared and delivered his opinion to the jury, that the payment of the sum of 171*l.* 5*s.* 7*d.*, by the plaintiff to the defendants, having been made to obtain possession of a paper of great value to the plaintiff, and because he was obliged to make the payment

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payment for that purpose, was not a voluntary payment, and that the plaintiff was not concluded from recovering the said sum of 715*l.* 5*s.* 7*d.* from the defendants; and the Chief Justice did further declare and deliver his opinion to the jury, that such sums of money as were stated in the accounts to have been received the jury might conclude to have been received, as there was no evidence to the contrary; and that with respect to such items as were stated in the accounts to be not received, or not yet received, the jury might consider the mode in which the parties dealt together as evidenced by the letters and accounts; and inasmuch as commission was charged by *Howard* and *Gibbs*, the bankrupts, on all those items, and as successive accounts were rendered, still charging commission, and the items stated in a former account not to have been received not being brought forward in subsequent accounts between the parties or debited to the plaintiff, or any subsequent notice given to the plaintiff of their non-payment, there being in evidence four successive accounts between the parties, they, the jury, might infer an agreement by *Howard* and *Gibbs*, the bankrupts, to take the responsibility for the payment of the said items on themselves; but that it was a question for their consideration and decision; and that, upon the aforesaid evidence, the jury might lawfully find a verdict for the plaintiff, and with that direction left the same to the jury.

Hill for the plaintiff in error. There was no evidence to go to the jury of any agreement between *Woodcock* the plaintiff and the bankrupts, binding the latter to pay the instal-

instalments of the several annuities in default of payment by the grantors. Such an agreement would amount to an undertaking to pay the debt of another, and must have been in writing. The original agreement, therefore, ought to have been produced, or it ought to have been shewn to have been lost or destroyed. In *Shaw v. Dartnall* (a), it was argued that the bankrupts were agents acting under a *del credere* commission. But the Court held, that such a conclusion could not be drawn from the entries in the books, it being wholly inconsistent with the entry made in that case as to one of the annuities, that it was money not yet received. Besides, the observation applies to this case, that if that had been the contract, the bankrupts would have given the grantee of the annuities credit for the instalments on the days when they became due. Those entries in the accounts did not afford any evidence whence the jury could infer that the bankrupts had agreed to guaranty the payment of the annuities, but that they intended from time to time to make the plaintiff believe that the annuities had been paid into their hands to induce him to continue his dealings with them. That was the only inference to be deduced from the accounts. Secondly, this was a voluntary payment made with full knowledge of all the facts, and the money paid cannot be recovered back. Two circumstances must concur to take a case out of that rule. First, the payment must be made in order to get possession of goods for which the owner has an immediate pressing necessity, *Astley v. Reynolds* (b). Secondly, the claim of lien must be clearly void. In

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(a) 6 B. & C. 56.

(b) *Strange*, 915.

1827. *Phillips v. Down* (a) Lord Kenyon said, where a voluntary payment is made of an illegal demand (the party knowing the demand to be illegal), without an immediate and urgent necessity, that is, unless to redeem or preserve his person or goods, it is not the subject of an action for money had and received. Here *Woodcock* had no immediate pressing necessity for the policies. It does not appear that the persons whose lives were insured were dead. The bankruptcy of *Howard* and *Gibbs* took place in 1821, the plaintiff did not apply for the policies until 1822. Secondly, the claim of lien was not clearly void: whether it was so or not, depended on the mode of rendering the accounts between principal and agent. Then, unless it was clear that the assignees had not any lien, *Woodcock* ought to have brought trover, which is the proper legal remedy in such a case. He must, in that form of action, have tendered the exact amount of the defendant's lien, which, in a matter of such complicated account, it might be difficult to ascertain, and in default of so doing, would have had to pay the costs of the action. By paying the money claimed, he makes the assignees defendants, and throws on those who held the security, the necessity of making the proper tender. This was a voluntary payment, because it was made merely to avoid the necessity of bringing an action of trover, and in order to gain an advantage in the mode of trying the right of lien.

Parke contra. This was not a voluntary payment, for the assignees refused to deliver up the policies until

(a) 6 Esp. 26.

the sum required was paid. The plaintiff was therefore compelled to pay the money to obtain possession of his own property. The Lord Chief Justice was right in leaving it to the jury to find, whether, under the circumstances, *Howard* and *Gibbs* had or had not agreed to make themselves responsible for the annuity instalments for which they gave credit, but which were stated at the time not to have been received. It was a question for the jury with what intent those entries were made. Those entries may have been made, because *Howard* and *Gibbs* knew that they had guaranteed the payment of the annuities. The argument urged on behalf of the plaintiff in error goes to shew that the conclusion of the jury was wrong, but not that there was not evidence to shew that such an agreement existed. Here four accounts were delivered. In all of them credit was given for annuity payments, which were not received, and the bankrupts paid the grantees those instalments as if they had been received, and in the later accounts never intimated that they looked to the plaintiff to repay them those sums for which they had given him credit in the former.

LORD TENTERDEN C. J. I am of opinion that the question was properly submitted to the jury. The bill of exceptions, after setting out the evidence, states, that the Lord Chief Justice told the jury, that from the evidence, they might infer an agreement by the bankrupts to take on themselves the responsibility as to those items of account for which credit was given to *Woodcock*, the plaintiff below, but which were described as not received, but that it was a question for their consideration upon the evidence. The question now before this Court, is not whether the conclusion come to by the jury was correct, but whether the evidence was such as that the

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 v. *Howard*
 & *Gibbs*
 against
Woodcock.

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against
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jury might lawfully infer from it such an agreement. It appeared that there had been delivered to *Woodcock*, by the bankrupts, four successive accounts, in each of which the latter took credit for commission on the instalments of the annuities as if they had been received. In the first account they give him credit for half yearly instalments of two annuities, and stated a balance of 94*l.* to be due to *Woodcock*. In a letter from one of the bankrupts, accompanying this account, he informs *Woodcock* that those two sums had not been received, but that his bill for the balance would be accepted. At the very time, therefore, when he says he has not received the money for which credit is given, he charges commission as if it had been received, and promises to accept a bill drawn upon him and his partner for the balance of the account. A second account is afterwards sent in, in which all the annuity instalments due to *Woodcock* were included, although they were not received, and *Gibbs* desires that when he feels a necessity to draw, he will let him (*Gibbs*) know. So, when the third account is sent, although *Woodcock* is informed by *Gibbs* that a half-yearly instalment of *Cutcliffe's* annuity, for which credit was then given, had not been received, he is at the same time told that he may draw for the balance struck in that account. In the fourth account, credit is given for two half-yearly instalments, which were stated not to have been received, but in the letter accompanying that account, the plaintiff is not informed that he may draw for the balance. It must, however, be taken that he did draw for the balance of that as well as of all the other accounts, for otherwise there could not have been due to the bankrupt or the assignees the balance claimed and paid to redeem the policies. This being the state of the accounts between

tween the parties, the assignees of the bankrupts insisted that they were entitled to be allowed in account all those sums, for which they had authorized *Woodcock* to draw, and which were paid by the bankrupts in respect of those annuity instalments which were stated not to have been received; and they, as assignees, being in possession of certain policies of insurance, and *Woodcock* having occasion for them, the assignees refused to deliver them up unless he paid 71*l.* 5*s.* 7*d.* The question which arises in this action wherein the plaintiff below seeks to recover back the money which he paid in order to obtain possession of the policies, is precisely the same as if the assignees had brought an action to recover back the money paid by them; and it is clear that such an action would be answered if the defendant were to shew that the bankrupts had agreed to become responsible for the instalments of the annuities in default of payment by the grantors; and that being so, if there was such an agreement proved in this case, the assignees had no lien, and consequently cannot retain the money which they compelled the plaintiff to pay. Now the circumstances of the bankrupts having from time to time given the grantee credit for the annuity instalments, and having authorized him to draw for the amount of those instalments, and having actually paid them although they had not received them, and not having intimated in the later accounts that they expected to be repaid those sums, and having, moreover, charged commission upon those sums, were some evidence for the jury to infer that they had made those payments in pursuance of some agreement on their part to do so, whether they received them or not; and if there was evidence to go to the jury, then I think the question was properly submitted to their

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consideration, and, consequently, the judgment of the Court of Common Pleas ought to be affirmed.

BAYLEY J. If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion and may be recovered back. There is no authority to shew that the two things mentioned in argument are required in order to make the payment compulsory. That being the general rule of law it is quite clear that the sum paid to obtain possession of these policies was not a voluntary payment, and that it may be recovered back, unless the assignees had a right to receive the money. Upon the other point I think that there was some evidence from which the jury might infer an agreement between *Woodcock* and the bankrupts, by which the latter became responsible for the payment of the annuities, and we are not in this state of the proceedings to inquire whether their conclusion was right or wrong. It has been argued that in order to make such an agreement binding on *Howard* and *Gibbs*, it should have been in writing. That argument for a time created some doubt in my mind. But on further consideration I think there was in this case evidence of an assumed and executed responsibility. The plaintiff below does not attempt in this action to enforce such an agreement by compelling payment. The bankrupts have executed the agreement by paying the money which they had not received. We must look to the whole of the accounts to see whether there was any evidence to shew that

that the bankrupts had taken upon themselves the responsibility, and looking at them I think there was some evidence from which the jury might draw that inference, although upon that evidence I should, perhaps, have come to a different conclusion. I think, therefore, the question was properly submitted to the jury, and that the judgment of the Court of Common Pleas ought to be affirmed.

D. Q.

HOLROYS J. Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary, but a compulsory payment, and may be recovered back; and if the plaintiff below, therefore, was compelled to make the payment in question in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back. The other question is, whether it was properly left to the jury to infer from the evidence an agreement by Howard and Gibbs to become responsible for the payment of the annuities? If, as in *Shaw v. Dartmouth* (a), one account only had been delivered, that might not have been sufficient to prevent the party who delivered the account from saying that he had not received the money, or that whether he had received it or not he had not made himself responsible for it. But in this case successive accounts were delivered from time to time, and in all of them credit was given for instalments of annuities not received at the time when those accounts were respectively delivered. In the later accounts there was no allusion to the sums for which

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(a) 6 B. & C. 64.

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credit was given in the earlier as sums not received. In fact, those sums had not been received. That was evidence to be laid before the jury in order to shew that the bankrupts had made themselves responsible for the sums which they had so paid. Suppose such successive accounts had been delivered by the bankrupts from time to time for four or five years, and that the balance had been always paid by them, although they had not in fact received the instalments for which they had so given credit, would not those accounts have afforded a fair ground for a jury to have inferred that the party who had for that period given credit for those sums had made himself responsible for them. Here the accounts were not delivered during so long a period of time. But they still afford some evidence of such an agreement; and if there was any evidence, then upon a bill of exceptions we cannot say that the question was not properly submitted to the jury.

LITTLEDALE J. concurred.

Judgment affirmed.

Saturday,
June 30th.

ROGERS *against* JONES.

By the 12 G. 3. c. 29. s. 2., it is provided, that before arrest by an inferior court, an affidavit of debt shall be made before the officer who issues the process, or his deputy: Held, that the deputy must be appointed for issuing process, and not merely for taking affidavits.

An acknowledgment of a debt, made by a debtor after arrest, but before an escape, is evidence against the marshal in an action for the escape. *Per Bayley J.*

West-

Westminster, was indebted to the plaintiff in the sum of 200*l.* upon and in respect of certain causes of action before then accrued to the plaintiff against *H. S.*, within the jurisdiction of the said court. That the said sum of money being unpaid, and *H. S.* then being a prisoner for debt in the actual custody of the mayor, &c. of *Dover*, at the suit of *H. D.*, plaintiff for the recovery of his debt, on, &c. at, &c. and within the jurisdiction of the said court, duly made an affidavit before *T. Pain*, duly constituted and appointed to take affidavits in the same court. (The declaration then set out the affidavit, plaint, and precept, and alleged a detainer of *H. S.* thereupon.) And *H. S.* being detained, and remaining a prisoner at the suit of the plaintiff for the cause aforesaid, afterwards, to wit, on, &c. at, &c. was brought before Sir *G. S. Holroyd*, one of the Justices of K. B., by virtue of a writ of habeas corpus, and was thereupon then and there duly committed, by Sir *G. S. Holroyd*, to the custody of the marshal of the Marshalsea, there to remain until, &c. By virtue of which commitment, defendant, then and still being marshal of the Marshalsea, took *H. S.* into his custody, and detained her until afterwards, to wit, on, &c. he the defendant, without the licence, &c. voluntarily suffered *H. S.* to escape. Plea, not guilty. At the trial before Lord *Tenterden* C. J., at the *Westminster* sittings after last *Hilary* term, it was proved, that *H. S.*, a native of *France*, had given to the plaintiff four promissory notes for 50*l.* each, dated at *Dover*, but payable at *Calais*. The consideration for the notes was not proved to have been given at *Dover*. The town-clerk of *Dover* is the proper officer to issue process out of the court of record holden before the mayor and jurats, and has for many years been in the

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 ROGERS
against
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against
Jencks.

habit of giving to several persons at *Dover* a deputation to take affidavits of debt. *T. P.*, before whom the affidavit mentioned in the declaration was sworn, had a deputation of this nature, but was not the deputy of the town-clerk for general purposes. The arrest of *H. S.*, an acknowledgment of the debt by her when in custody at *Dover*, the removal by habeas corpus, issued at the suit of the plaintiff, and the escape, were then proved. For the defendant it was objected, that there was no evidence that the debt arose within the jurisdiction of the court of record at *Dover*, and that *T. P.* had not any sufficient authority to take the affidavit of debt. The Lord Chief Justice reserved these points; and the plaintiff having obtained a verdict, a rule nisi for a nonquit was granted in *Easter* term.

The *Attorney-General* and *Comys* shewed cause. It appeared that the affidavit of debt was sworn before *T. P.*, a person appointed by the town-clerk, according to the practice followed for many years. *T. P.* was the deputy of the town-clerk for that purpose, and his appointment was analogous to the appointment of commissioners for taking affidavits in the superior courts. The statute 12 G. 1. c. 29. does not make it necessary that he should be deputy for general purposes. Then it was objected that the cause of action did not arise within the jurisdiction of the court of record at *Dover*. But the notes were made at *Dover*, and, moreover, the plaintiff was not bound to prove that the cause of action arose within the limited jurisdiction, the cause having been removed into this court. [Lord *Tenterden* C. J. The cause was removed by the plaintiff, and it does appear singular that a party should be able to
arrest

arrest a debtor by process out of an inferior court, for a cause not within its jurisdiction, and have the benefit of that arrest by removing the cause into a superior court.] At all events, the giving of the notes to the plaintiff constituted a cause of action, and that arose at *Dover*; and the debtor when in custody there acknowledged the debt.

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Reame
against
James.

Gurney and Campbell contra. The affidavit of debt was made before a person who had no authority to take it. By the 12 G. 1. c. 29, an act made to prevent frivolous and vexatious arrests, a difference is made between superior and inferior courts in this respect. In the former, a commissioner may take affidavits; in the latter, they must be sworn before "the officer who issues the process or his deputy;"—that means his deputy for the general purposes of his office, not merely for taking affidavits. Next, the cause of action was not proved to have arisen within the inferior jurisdiction. The date of the notes was not evidence of their being made at *Dover*, nor were they proved to have been delivered at that place. The acknowledgment of the debt made after the arrest was not evidence against the marshal. [*Bayley J.* It would be evidence if made before the escape.]

Lord TENTERDEN C. J. We are of opinion that *Perré*, before whom the affidavit of debt was made, was not a deputy within the meaning of the statute 12 G. 1. c. 29. That statute says that the affidavit must be sworn before the officer who shall issue the process or his deputy. It is not necessary to say whether that requires the deputy to be appointed generally for the officer; but, at all events, it makes it necessary that he should

1827. should do deputy for the purpose of issuing process; and the only authority delegated to Rain was that of taking affidavits: consequently the arrest was not good; and as the party was never in lawful custody, the action for the escape can be maintained against the marshal. The rule for entering a noli suit must, therefore, on this ground, be made absolute, and it becomes unnecessary to say any thing as to the other point. But it may be proper to notice that in *Molton v. Gardner* (a) it was decided, after consideration, that a plaintiff having arrested a debtor by process out of an inferior court cannot, by habeas corpus ad respondendum, remove him into the custody of this court to answer to a new action here for the same debt.

Rule absolute.

(a) 1 Cowp. 116.

- *Wain v. Bailey* 10 A. 116
 - *Romaz v. Lane* 1 G. 116
 - *Blackie v. Pedding* 6 G. 116

Tuesday,
 July 3d.

HANSARD against ROBINSON.

The holder of a bill of exchange cannot by the custom of merchants insist upon payment by the acceptor, without producing and offering to deliver up the bill; and, therefore, it was held that the indorsee of a bill having lost it, could not in an action at law recover the amount from the acceptor, although the loss was after the bill became due, and the indorsee offered an indemnity.

THIS was an action by the plaintiff, as indorsee, against the defendant as acceptor of a bill of exchange for 32l. 1s. 6d., dated the 10th of October 1828, drawn by *Henry Butterworth*, payable forty days after date, accepted by the defendant, and indorsed by *Butterworth* to the plaintiff. Plea, the general issue. At the trial before *Littledale J.* at the *Westminster* sittings after *Michaelmas* term 1826, it was proved by the drawer that the defendant being indebted to him in

the

the sum of £21.1s. 6d. for books, he, on the 10th of October 1823, drew a bill on him for that sum, payable at forty days after date, which the defendant accepted. The bill was drawn on a proper stamp. *Butterworth* indorsed the bill in blank, and delivered it, so indorsed, to the plaintiff. The bill became due on the 22d of November 1823, but was not presented for payment until the 1st of May 1824. The defendant then offered to give in payment another bill, but before that bill was given the plaintiff's clerk lost the original bill. The plaintiff informed the defendant of the loss, and offered him an indemnity, but he refused to pay the amount unless the bill was produced and delivered up to him. Upon this evidence it was contended that the plaintiff, the indorsee of the bill, could not recover against the acceptor unless the bill were produced, or shewn to have been destroyed, because the acceptor was liable to be sued by a bona fide indorsee for value at any time, even although the bill might have been obtained by a prior party through fraud or felony; that there was no privity between the indorsee and the acceptor except through the bill; and that the latter by his acceptance undertook only to pay the bill upon its being produced and delivered up to him. There was no breach of his contract unless the bill were so produced by the holder, and unless the latter offered to deliver it up, on being paid the amount. As to the offer of indemnity, a court of law had no power to compel a party, who by law was entitled to have the bill delivered up to him, to take an indemnity. A court of equity is the proper tribunal to judge of the sufficiency of the indemnity. The learned Judge was of opinion that the plaintiff was not entitled to recover, unless he produced the bill;

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Thomas
vs.
Ransom.

and

1877.

—
HARRIS
against
Benson.

and directed a nonsuit, with liberty to the plaintiff to move to enter a verdict for the amount of the bill. A rule nisi having been obtained for that purpose.

Campbell and Patterson, in Easter term, shewed cause. There are certainly contradictory authorities on this point; but the *Nisi Prius* cases of *Pearson v. Harrison* (a), *Mayer v. Johnson* (b), *Peole v. Smith* (c), *Dungham v. Wilby* (d), *Brook v. Hill* (e), and a case tried before Lord Eldon, when Chief Justice of the Court of Common Pleas, and mentioned by him in *Ex parte Graceway* (f), and two cases in Banco decided by the Court of Common Pleas, *Davis v. Dodd* (g) and *Champion v. Terry* (h), are in favour of the defendant. *Wylliamson v. Clements* (i) is not an authority against him, for there the action was on a special promise, and the consideration stated, for that promise, was, that the defendant was indebted to the plaintiff on a bill of exchange, and that the plaintiff having lost the bill, had at his request given him a bond acknowledging payment, and conditioned to indemnify him against the bill; and on motion in arrest of judgment it was held that, after verdict, it must be taken to have been proved at the trial, that the defendant was so indebted; and that there was, therefore, a good consideration for the promise. In *Long v. Beattie* (k) the bill was specially indorsed to the plaintiff, and had no indorsement from him upon it, and no other person but the plaintiff could have acquired a right to sue thereon. *Brown*

(a) 2 Camp. 211.

(b) 3 Camp. 324.

(c) 1 Holt N. P. C. 144.

(d) 5 Esp. N. P. C. 158.

(e) 2 Camp. 381.

(f) 5 F. & R. 112.

(g) 4 Taunt. 602.

(h) 3 Brod. & B. 295.

(i) 1 Taunt. 523.

(k) 2 Camp. 314.

v. Minter (a) was a decision of a single judge, and no cause was shown against the rule for referring the bill to the Master, to compute principal and interest; and *Glover v. Thomson* (b) was an undefended cause. *Hart v. King* (a) was a *Nisi Prius* case before *Holt C. J.*, and it does not appear from the report in what character the plaintiff sued. The bill might have been either indorsed specially or not at all; it might have been proved to have been destroyed, or might have been in such a state, when lost, that other persons could not recover upon it.

1817.

Harwood
against
Bennett.

Gurney and Chitty, contra, relied upon the three last-mentioned cases; and on a *Nisi Prius* case of *Dart v. Hinkes*, tried before Lord Tenterden, and a case of *Rolfe, Assignee, vs. Watson*, before Best C. J., at the sittings in last Easter term, where, in an action on a lost bill, the jury having found that the bill was not indorsed at the time of the loss, the plaintiff was permitted to recover. And they contended that it was material for the plaintiff in this case, that the bill was not lost until after it became due, and after the defendant had made default in not paying it when presented.

Cur. adv. vult.

Lord Tenterden C. J. now delivered the judgment of the Court. This was an action on a bill of exchange, brought by the indorsee against the acceptor. The bill was not produced at the trial, but proof was given of the signature of the parties and other particulars of the bill, and that it was lost after it had become due, and after payment had been required of the defendant, and he had requested time and promised payment.

(a) 5 M. & S. 981.

(b) 1 Ryan & Moody, 403.

(c) 12 Mod. 510.

1827.

~~SAUNDERS~~
HAWKARD
against
ROBINSON.

provision is not new in the law of that country, but is found also in the *Ordonnance de Commerce* of *Louis* the Fourteenth, *Tit. 5. Art. 19*. The rule for entering a verdict for the plaintiff must therefore be discharged.

Rule discharged.

Wednesday,
July 4th.

SANDIMAN *against* BREACH.

The statutes
3 Car. 1. c. 1.
and 29 Car. 2.
c. 7. do not
make it illegal
for stage-
coaches to tra-
vel on the
Lord's day.

ASSUMPSIT to recover the expense of hiring a post-chaise to convey the plaintiff from *Clapton* to *London*, the defendant, who had contracted to take him in his stage-coach, having neglected to do so. Plea, the general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Michaelmas* term 1826, it appeared that on a *Sunday* the plaintiff sent to a booking-office kept by the defendant, who was the proprietor of a stage-coach travelling from *Clapton* to *London*, booked himself to be carried to *London* on that evening, and paid half the fare. The defendant afterwards, not having any passenger except the plaintiff, refused to go to *London*, and thereupon the plaintiff hired a post-chaise. For the defendant, it was contended, that the contract was illegal, being in contravention of the statutes, 3 Car. 1. c. 1. and 29 Car. 2. c. 7., and that, therefore, the defendant was not bound to perform it. The Lord Chief Justice gave the defendant leave to move to enter a nonsuit, and the plaintiff had a verdict for 13s. In *Hilary* term a rule for entering a nonsuit was obtained, against which

Dodd shewed cause. The statutes referred to at the trial do not prevent stage-coaches from travelling on the Sabbath.

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against
BREACH.

Sabbath. The 3 Car. 1. c. 1. begins by reciting, that "the Lord's day is much broken and profaned by carriers, waggons, carters, wainmen, butchers and drovers of cattle;" and then enacts, "that no carrier with any horse or horses, nor waggon-men with any waggon, nor carman with any cart, nor wainmen with any wain, nor drovers with any cattle, shall by themselves, or any other, travel upon the said day, upon pain that every person so offending shall forfeit 20s. for every such offence." The only word there used, that could by possibility apply to a stage-coachman, is *carrier*, but that means carrier of goods; and, accordingly, in *Ex parte Middleton (a)*, where the driver of a van was held to be a carrier within the meaning of the act, the Court expressly avoided giving any opinion as to the drivers of stage-coaches. By the 29 Car. 2. c. 7. s. 1. it was enacted, "that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof, works of necessity and charity only excepted; and that every person being of the age of fourteen years or upwards, offending in the premises, shall for every such offence forfeit the sum of 5s." The defendant does not come within any part of the description there given, and the general words "other person," are applicable only to persons *ejusdem generis*. [Lord *Tenterden* C. J. Is there not some provision as to travellers by water?] Yes, in section 2. but that is in favour of the plaintiff; for as some travellers are specially mentioned, the Court will not extend its provisions to any others. The words

(a) 3 B & C. 164.

1827.

SAYDWAY
against
BARRACK.

are, "no drover, horse-courser, waggoner, butcher, higgler, their or any of their servants, shall travel or come into his or their inn or lodging upon the Lord's day, upon pain that every such offender shall forfeit 20s. for every such offence; and that no person shall use, employ, or travel upon the Lord's day, with any *heaf, wherry, lighter, or barge*, unless it be upon some extraordinary occasions, to be allowed by some justice of peace." Even if the language of the first section applied to the driver of a stage-coach, his employment would come within the exception of "works of charity and necessity;" for it is necessary for many persons, as withnesses or medical men, to travel on *Sunday*, and this exception has always been liberally construed, *Rex v. Cox* (a), *Rex v. Younger* (b). But, secondly, if any offence was committed, that was by the defendant, and not the plaintiff. He alone is guilty of the offence who exercises his ordinary calling on the Sabbath, *Blosser v. Williams* (c), *Hodgson v. Temple* (d). Lastly, the defendant had a licence for his coach to travel on *Sunday*, granted in pursuance of the powers given to the commissioners of hackney coaches by the 25 G. 3. c. 5).

Gurney contra. There is no doubt that the defendant as a stage-coach proprietor and driver, had "an ordinary calling," and if he had exercised that calling on the Sabbath day, he would have been subject to the penalty imposed by the 29 Car. 2. c. 7., and the only question is, whether a person who has made a contract with another, in contravention of the law, can maintain

(a) 2 Burr. 785.

(b) 5 T. R. 450.

(c) 3 B. & C. 232.

(d) 5 Truist. 181.

an action against that other for refusing to perform such contract? [Lord Tenterden C. J. If the words "other person," in the first section, are large enough to include all persons having an ordinary calling, why should drovers and waggoners be specially mentioned in the second section?] The fifth section shews that persons travelling on the Sabbath were considered as offenders, for it deprives them of any remedy against the hundred in case of robbery. Then as to the exception of "works of necessity," the case of *Rex v. Cox* (a), which was a motion for a criminal information against a baker, was decided on the ground that he came within the exemption in section 3 in favour of cooks' shops.

1827.

SANTMAN
against
Baker.

Our. adv. vult.

The judgment of the Court was now delivered by Lord TENTERDEN C. J. It was objected that the plaintiff in this case could not recover, because the contract, for the breach of which the action was brought, was to have been performed on the Sabbath day, and that it could not legally be performed on that day. But upon looking into the statutes 3 Car. 1. c. 1. and 29 Car. 2. c. 7., upon which the objection was founded, we are of opinion that this case does not come within them. There have been subsequent statutes, containing regulations as to hackney coaches; but they are too ambiguous to be taken as legislative expositions of the former acts. By the first of these, the 3 Car. 1. c. 1., it was enacted, that no carrier with any horse, nor waggon-man with any waggon, nor carman with any cart, nor wainman with any wain, nor drover with any cattle, shall by themselves,

(a) 2 Burr. 785.

1827.

SANDIMAN
against
BEECH.

or any other, travel on the Lord's day;" and by the 29 *Car. 2. c. 7.* that "no tradesman, artificer, workman, labourer, or other person or persons, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day." It was contended, that under the words "other person or persons" the drivers of stage-coaches are included. But where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis. Considering, then, that in the 3 *Car. 1. c. 1.* carriers of a certain description are mentioned, and that in the 29 *Car. 2. c. 7.* drovers, horse-coursers, waggoners, and travellers of certain descriptions, are specifically mentioned, we think that the words "other person or persons" cannot have been used in a sense large enough to include the owner and driver of a stage-coach. For these reasons we are of opinion that the rule for entering a nonsuit must be discharged.

Rule discharged.

1827.

TOPE and NICHOLLS, Assignees of J. FORD,
against W. L. HOCKIN, Gent., one, &c.

Wednesday,
July 4th.

ASSUMPSIT for money had and received. At the trial before *Littledale J.*, at the Summer assizes, 1826, for the county of *Devon*, a verdict was found for the plaintiffs, damages 15*l.*, subject to the following case for the opinion of this Court as to the increase of the damages.

The plaintiffs were the assignees of the estate and effects of *John Ford*, a bankrupt, under a commission of bankruptcy dated the 4th day of *December* 1823, which was issued on that day upon the petition of *John Lyndon*, the brother-in-law of *Ford*. The acts of bankruptcy, in respect of which *Ford* was adjudged and declared a bankrupt under the commission, and which were stated and set forth in the proceedings and depositions before the commissioners, were committed by him on the 21st of *November* and the 1st of *December* 1823. At the trial, the trading, the petitioning creditor's debt, and these acts of bankruptcy, were duly proved, and no question was made thereon; and there was proved, and given in evidence, a certain indenture bearing date the 1st day of *October* 1823, made between *Ford* of the first part, and one *H. Mudge* and *J. Lyndon* of the other part, whereby *Ford* granted and conveyed

Where a commission of bankrupt was sued out on the petition of *A. B.*, founded on an act of bankruptcy in *December*, and it appeared that in the preceding *October*, the bankrupt, by a deed, to which *A. B.* was a party, assigned all his property: Held, that the assignees (although *A. B.* was not one of them) could not avail themselves of this deed as an act of bankruptcy in order to recover money subsequently paid by the bankrupt, inasmuch as the creditors represented by the assignees derived all their rights under the commission from the petitioning creditor, who was a party to the deed.

The money sought to be recovered had been deposited by the bankrupt in the hands of an arbitrator, who was to decide to whom it belonged. The arbitrator, before the commission issued, and without knowledge of any act of bankruptcy having been committed, paid the money over to the person whom he thought entitled to receive it: Held, that the assignees could not recover it from the arbitrator.

1827.

Tor
against
Heath.

all his goods and chattels in the county of Devon to *Mudge* and *Lyndon*, upon certain trusts in the deed specified. It did not appear that the bankrupt had at the date of the deed any goods or chattels out of the county of Devon. The deed was executed by *Ford* on the day of its date. *Lyndon* did not execute, but he was privy to it. Many years before this time, *Ford*, being the owner of a freehold estate at *Brent*, in the county of Devon, had mortgaged it at several times to several persons; but in the year 1823, he, by the intervention of *Smith*, an attorney, who had been for a long time concerned for him as his attorney, contracted to sell the same to a Mr. *Cornish*, and the purchase was to be completed on the 4th day of October in that year. Accordingly, on that day a meeting took place for that purpose at *Totness*, at which were present (*Ford*) *Cornish* (the purchaser), with his attorney, some of the mortgagees, *Smith*, who attended there as well on behalf of *Ford* as on behalf of two of the mortgagees, and *Hockin*, the defendant, who attended on behalf of a third mortgagee. *Smith* brought with him the title deeds of the estate, which had been in his possession for several years, and which had first come into his possession as the attorney for and on behalf of his clients, two of the mortgagees. The parties being assembled, *Cornish*, the purchaser, drew four checks upon a bank at *Totness* for the amount of the purchase money, viz. three for the separate amounts of the said several claims of the three mortgagees payable to them respectively or bearer, and the fourth for the amount of the residue, being the sum of 904*l.* payable to *Ford* or bearer. The first three checks were then given to the respective mortgagees, and the last-mentioned check *Ford* took

from

from the hand of *Cornish*, and put into his pocket, but *Smith* immediately claimed to have possession of it, and declared that the business should not be completed if the check was not given up to him. At this time the first two mortgagees had executed the deeds of conveyance, and the third mortgagee was in the act of executing them, but an altercation ensuing between *Smith* and *Ford* respecting the check, the business was interrupted, and the three first-mentioned checks were given back to *Cornish*. It was, however, finally agreed between *Smith* and *Ford*, that the check in question should be deposited in the hands of the defendant, who was named by *Ford*. Contradictory evidence was given both as to the grounds on which *Smith* claimed possession of the check, and also as to the purpose of the deposit with the defendant; but the jury found that *Smith* had made his claim on the ground of a balance due on bills for bills of costs, and on a cash account, and also on the ground of the authority hereinafter mentioned; and the jury also found that the deposit was made for the purpose of the defendant's determining the amount due from *Ford* to *Smith*, and also to Messrs. *Hill and Co.*, at that time bankers at *Dartmouth*, after payment of which sums he was to return the residue to *Ford*. The check was thereupon deposited by *Ford* in the hands of the defendant, and the purchase was completed. The defendant deposited this check at his bankers on the 8th day of October, and had credit with them for the amount thereof in a separate account; and on the 16th, *Ford*, with one *Fowle* an accountant, and *Smith*, met at the defendant's office at *Dartmouth*, when *Ford* agreed to a balance of account between himself and *Smith* to the amount of 262*l.* After this, but at the

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same meeting, Mr. *Hine* came to the defendant's office, and produced an account of the claims of *Hine* and Co. against *Ford*, and *Smith* also produced the paper-writing, bearing date the 31st May 1823, hereinafter set forth, and *Ford* and *Hine* went through the last-mentioned account; and, finally, the defendant decided, that the sum of 627*l.* was due from *Ford* to *Hine* and Co. He accordingly drew and delivered to *Smith* a check on his bankers, for the sum of 889*l.*, whereof 262*l.* was for *Smith* himself, and 627*l.* was to be by him paid to *Hine* and Co. The paper-writing so produced by *Smith* was as follows: "Mr. J. B. *Smith* — Sir, I hereby authorise and request you to retain the deeds of my estate at *Brent*, as security for my debt to Messrs. *Hine* and *Holdsworth*, after satisfying the mortgage, and request you to pay them the balance of my account out of the purchase-money, as soon as the property is sold. John *Ford*. — *Dartmouth*, 31st May 1823." — This paper was signed by *Ford* at the time of its date; and on signing it he gave it to Mr. *Hine*, and at *Hine's* request he immediately afterwards delivered it to *Smith*. The paper was stamped only with an agreement-stamp of the amount of 1*l.* It appeared, by the said account of *Hine* and Co., that on the 31st May 1823, there was due from *Ford* to *Hine* and Co. the sum of 806*l.* 18*s.* 11*d.* only, and on the 18th October following the said sum of 627*l.* The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the sum of 889*l.*, or any and what part thereof? If the Court should be of opinion that the plaintiffs were entitled to recover the sum of 889*l.*, or any part thereof, the damages were to be increased accordingly, but if otherwise, the damages to remain at the amount of 1*l.*

as aforesaid. The case was argued on a former day in this term by

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Carter for the plaintiffs. The deed of the 1st of October 1823, made between the bankrupt and *Mudge and Lyndon*, was an act of bankruptcy; and if it were so, then it overrides and annuls the payments made on the 18th of October to *Smith* and to *Hine and Co.* The deed, treating it as independent of any connection with the petitioning creditor, being an assignment of all the bankrupt's effects, was clearly an act of bankruptcy. Now the money came into the defendant's hands on the 6th of October, when he had credit for it with his bankers, and so remained until the 18th. It was, therefore, money had and received by him to the use of the assignees, which they are entitled to recover. The objection in this case will be, that the deed was a concerted act of bankruptcy between the bankrupt and *Lyndon* the petitioning creditor. Questions as to concerted acts of bankruptcy have only arisen in cases where it was proposed to give them in evidence as the foundation and support of the commission; and such concerted acts have been held not to be available, on two grounds. Some acts, if done by agreement, are not acts of bankruptcy at all. The very circumstance of their being agreed or concerted takes away one of the main qualities which must be found in the transaction to make it an act of bankruptcy, viz. the intention to delay creditors. Thus, in the case of a denial to a creditor, the latter cannot be said to be delayed when he comes by agreement to demand and to be denied. There is another ground upon which a concerted act has been held not to be available, viz. that although the act in itself

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itself may be an act of bankruptcy, yet the petitioning creditor is estopped from saying that it is so. The estoppel, however, is limited to the petitioning creditor who sets the proceeding in motion: he is bound to establish an act of bankruptcy available by himself to support the commission. The assignees also must show such an act of bankruptcy in order to originate their jurisdiction. But when that has been done, the creditors at large, represented by the assignees, may take the benefit of another act of bankruptcy, although the petitioning creditor was a consenting party to it. *Tappenden v. Burgess* (a) shews that the estoppel applies not to assignees who are mere trustees for the creditors at large, but only to a petitioning creditor who originates the commission (b).

Coleridge contra. The deed of the 1st of October 1823 is not available for any purpose under a commission sued out by *Lyndon* the petitioning creditor, because he was privy to it. It is clear that he could not have sued out a commission upon that act of bankruptcy. And although a commission has been sued out and supported on an act of bankruptcy free from this objection, reference cannot be had to the deed of the 1st of October by the assignees for the purpose of bringing property into the general fund. Unless the deed were fraudulent in law, it is not an act of bankruptcy; and he who has executed, assented to, or acted under such a deed, is estopped from saying that it is fraudulent. This estop-

(a) 4 East, 230.

(b) There were several other points discussed at the bar, upon which the Court did not pronounce any opinion, and the arguments as to those points have, therefore, been omitted.

pel is not merely personal to the petitioning creditor, but extends to the assignees. *Banford v. Baron* (a) shews that parties who have been privy and assenting to the deed of assignment cannot set it up as an act of bankruptcy; and *Tappenden v. Burgess* (b) shews that the estoppel on the assignees is in virtue of their representative, not their individual character, for there all the assignees except *Tappenden* (the petitioning creditor) were privy to the deed; and yet it was held that they might, under a commission founded on that deed, sue for and recover the bankrupt's estate. It was not necessary that *Lyndon* should execute the deed. In *Boss v. Gooch* (c), the only connection which the petitioning creditor had with the deed, which was relied on as an act of bankruptcy, was, that he knew of it while it was preparing, called on the attornies who were preparing it whilst it was in progress, and expressed no disapprobation, and when the bankrupts had executed it, recommended a person to take possession of the stock; so in *Hicks v. Buryell* (d), the petitioning creditor was only privy and consenting to the deed. In *Esporte Quintrell* (e) the Lord Chancellor said, "If the petitioning creditor has acted under the deed, although he may not have executed it, he not only cannot avail himself of it as an act of bankruptcy, but will be liable to all the costs of the commission.*" It is true, that in all these cases the commission rested on the deed. But, if neither the petitioning creditor could have sued out, nor the assignees sustained the commission upon this deed, they must, on the same principle, be prevented

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(a) 4 T. R. 559. (b) 4 East, 230.
 (c) 10 H. 40. 13. and 4 Camp. 232. (d) 4 Camp. 235.
 (e) 1 Ross, 313.

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from relying upon it for the purpose of overreaching the transaction in question.

Supposing, however, that the assignees may treat this deed as an act of bankruptcy, still this action is not maintainable against the present defendant. He was a mere arbitrator. The money was only deposited with him. He had no interest in it. He never mixed it with his own, and he paid it over without having notice of any act of bankruptcy or of insolvency. *Coles, Assignee of Wright, v. Robins (a), Coles v. Wright (b)*, are authorities to shew that under such circumstances the defendant is not liable.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court; and, after stating the facts of the case, proceeded as follows: Upon the argument of this case some questions were raised upon the effect of the paper signed by the bankrupt *Ford* on the 31st of May 1828, and the sufficiency of the stamp upon it, as relating to the lien of *Hine* and *Holdsworth* on the title-deeds of the estate sold to *Cornish*, and which were in the hands of *Smith*, and also as to the lien of *Smith* himself upon those deeds. But as the payment made by the defendant to *Smith* was of a sum assented and agreed to by the bankrupt, and the payment to *Hine* and *Holdsworth* was made under an authority delegated by him to the defendant, as an arbitrator, to settle and pay their claim, if these payments were made before any act of bankruptcy committed by *Ford* of which the plaintiffs can avail themselves, all those questions become immaterial. And we think the payments were so made. They were made

(a) 5 Camp. 185.

(b) 4 Tunt. 198.

on the 18th of *October*. The commission issued on acts of bankruptcy committed on the 21st of *November* and 1st of *December* following. It issued on the petition of *John Lyndon*. The plaintiffs endeavoured to overreach these payments by proof of an act of bankruptcy committed on the 1st of *October*. That act of bankruptcy was the execution of a deed conveying all the bankrupt's goods and chattels in *Devonshire*, the county of his residence, to one *Henry Mudge* and this *John Lyndon*, for the purpose of discharging a debt due to them. *Lyndon* was privy to this transaction; and, therefore, taking the deed to be an act of bankruptcy, it is clear by all the authorities that *Lyndon* could not be allowed so to treat it, and to take out a commission upon it. But it was argued that although the law might be so as to the suing out a commission, yet if the commission were sued out upon another distinct act of bankruptcy sufficient to sustain it, the creditors represented by the assignees (*Lyndon* not being an assignee) might, nevertheless, avail themselves of this act of bankruptcy for the purpose of avoiding subsequent acts by force of the relation to this deed. We, however, think that the reasons upon which the creditors at large are not allowed to avail themselves, for the purpose of supporting the commission, of an act which the petitioning creditor is not allowed to call an act of bankruptcy, although another creditor might do so for that purpose, apply equally to the present purpose, for which they rely upon it. One reason must be, that the creditors at large are to be considered as connected with the petitioning creditor, and as deriving their rights under the commission from him; for if they were not so considered, they might say, "Here is a good act of bankruptcy, and a sufficient debt owing to the

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the petitioning creditor. In this connection with the act of bankruptcy is immaterial to us: there are many among us to whom debts were owing of sufficient amount to have authorized us to sue out a commission; and, therefore, in our favour the commission shall stand good." Another reason may be, that if a commission issued out by such a petitioning creditor could be available, he would have a right to prove his debt under it, and participate in the dividend, and so would derive a benefit from a commission which he ought not to have issued out, and thus take advantage of his own wrong. And this reason also will be applicable to the purpose for which the act of bankruptcy in October is insisted on. For if the plaintiffs can avail themselves of that, they will increase the fund to be divided, and *Lyndon* will participate in that increase.

As this objection alone is sufficient to defeat the plaintiffs' claim, it is not necessary to pronounce a judicial opinion upon any other. But adverting to the case of *Coles v. Wright* (a), which was quoted by Mr. *Chlbridge* in support of his last objection, we think that that objection is also good, and that the money cannot be recovered from the present defendant. It was placed under his controul for a special purpose; it was never mixed with his own, but kept separate as a distinct fund, to answer that purpose; he was to derive no benefit from it; he afterwards applied it to the intended purpose, in part with the express assent, and in part under the authority of *Ford*. He was, therefore, as it appears to us, a mere channel of conveyance, and his situation was the same in effect as that of *F. Wright*, in the case that has been quoted, with this difference in his favour, that *F. Wright* might have

(a) 4 Taunt. 198.

knows that the person to whom he carried the money, and who was then in prison for debt, might by continuing in prison become a bankrupt, from a time antecedent to this transaction; whereas the present defendant had no knowledge of the execution of the deed, which had been managed altogether in secret. It is obvious that such inconvenience and obstruction to business might take place, if one who is employed as a mere gratuitous carrier, or made the gratuitous channel of conveyance or delivery, should be answerable for property passing through his hands, under circumstances which lead to no suspicion that the transfer may not be made lawfully and without injury to the right of any third person. And a decision to this effect would be a great hardship on the individual so employed, and give a very harsh (and I may say as to him a very injurious) effect to that relation to the act of bankruptcy, which, though necessary, for many purposes, it has been the object of the legislature, in modern times, to narrow and contract within the compass that justice to particular individuals requires. For these reasons we think that the damages ought not to be increased, but that the verdict should stand for £51. only.

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Hobbs.

WILLAN *against* TAYLOR.

THIS was an action brought by a stranger, upon the statute, 9 *Ann.*, c. 14. s. 2., to recover treble the value of money lost at play, the loser not having

The plaintiff,
in an action on
the statute
9 *Ann.*, c. 14.
s. 2., recovered
treble the value

of money lost at play, the loser not having sued within the time prescribed by the statute. A writ of error was brought by the defendant, and judgment was affirmed without costs. Held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs.

brought

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brought any action within three months. By that statute it is provided, that the loser of 10*l.* at cards, &c. may sue for the money within three months; and in case the person who shall lose such money, shall not, within the time aforesaid, sue for the same, it shall be lawful for any person by any action or suit to sue for and recover the same, and treble the value thereof, with costs of suit, against the winner, the one moiety thereof to the use of the person that will sue for the same, and the other to the use of the poor of the parish where the offence shall be committed. There was a verdict for the plaintiff for 540*l.* A writ of error was brought, and judgment was affirmed in the House of Lords, but the costs of the writ of error were refused.

Brodrick moved that satisfaction might be entered on the judgment roll, upon payment of one half of the penalty to the churchwardens and overseers of the parish of *St. James*, where the offence was committed, the defendant having paid the other moiety and all taxed costs to the plaintiff.

Patteson, contra, insisted that the plaintiff had a right to receive the whole penalty, and pay over to the poor one moiety of the surplus, after deducting the costs of the writ of error.

LORD TENTERDEN C. J. In the absence of all authority, we are of opinion, upon the words of the statute, that the poor are entitled to one moiety of the penalty, without deducting costs.

Rule granted.

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F. H. RENNELL, Administratrix of THOMAS RENNELL, Clerk, *against* The Bishop of LINCOLN, T. H. MIREHOUSE, and W. S. MIREHOUSE.

Tuesday,
July 3d.

QUARE impedit. The declaration stated, that whereas one *William Dodwell*, clerk, doctor in divinity, late prebendary of the prebend or canonry of *South Grantham*, founded in the cathedral church of *Salisbury*, heretofore, to wit, on, &c. at, &c. was seised of and in the said prebend or canonry, with its appurtenances, to which said prebend or canonry the advowson of the rectory of the parish church of *Welby* with its appurtenances then belonged and still belongs, in his demesne as of fee, in right of the said prebend or canonry. And so being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry, with its appurtenances, to which, &c. afterwards, to wit, on, &c. at, &c. presented to the said church of *Welby*, being then vacant, one *William Dodwell*, master of arts, his clerk, who, on the said presentation of the said *W. D.*, doctor in divinity, was admitted, instituted, and inducted into the same in the time of peace, &c. That the said *W. D.*, being so seised of the prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, afterwards, to wit, on, &c. at, &c. died so seised; after whose death, to wit, on, &c. at, &c. one *Robert Price*, clerk, was lawfully admitted, &c. and afterwards died; after whose death, to wit, on, &c. at, &c. *Thomas Rennell*, the intestate, was lawfully admitted, instituted,

Where a prebendary, having the advowson of a rectory in right of his prebend, dies whilst the church is vacant, his personal representative has the right of presentation for that turn. Per *Boyley, Holroyd, and Littledale Js.* Lord *Tenterden* C. J. diss.

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instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which, &c. whereby the said *Thomas Rennell* then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry. And the said *Thomas Rennell* being so seised, the said church, afterwards, to wit, on, &c. at, &c. became vacant by the death of the said Rev. *William Dodwell*, clerk, the late parson and incumbent thereof, and still is vacant, whereby it then and there belonged to the said *Thomas Rennell* to present a fit person to the said rectory of the said parish church so vacant as aforesaid. Averment, that afterwards, and whilst the said church was so vacant as aforesaid, to wit, on, &c. at, &c. the said *Thomas Rennell* died intestate, so seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, without having presented any person to the said rectory of the said parish church; after whose death, and whilst the said church was so vacant as aforesaid, to wit, on, &c. at, &c. administration was granted to the plaintiff, whereupon and whereby it then and there belonged, and now belongs to the said *F. H.*, as administratrix as aforesaid, to present a fit person to the said rectory of the said parish church so being vacant as aforesaid, and which is still vacant, but the said Bishop of *Lincoln* and the said *T. H. Mirehouse* and *W. S. Mirehouse* unjustly hinder her, &c. The Bishop of *Lincoln*, by his plea, disclaimed except as to the admission, institution, and induction of the rectors to the same rectory and parish church, and all such other things as belong to the

the ordinary as ordinary of that place. The said defendants, *T. H. Mirehouse*, clerk, and *W. S. Mirehouse*, clerk, pleaded that after the said *T. Rennell* had so died without having presented any person to the said rectory of the said parish church, and whilst the said church was so vacant as aforesaid, to wit, on, &c. at, &c. he, the said defendant, *T. H. Mirehouse*, clerk, was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which said prebend or canonry the said advowson with its appurtenances then belonged and still belongs, whereby he the said *T. H. Mirehouse* then and there became and was seized of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, and whereby it then and there belonged to him to present a fit person to the said rectory so being vacant as aforesaid; and that the said *T. H. Mirehouse* presented the said defendant *W. S. Mirehouse*. Upon the bishop's disclaimer, the plaintiff prayed judgment against him, and demurred to the plea of the other defendants, joined in demurrer. The case was argued in C. P., and judgment given for the defendants, whereupon the plaintiff brought a writ of error. The case was argued in Michaelmas term, 7 G. 4., by

JOHN LEE and *JOHN LEE*, for the plaintiff in error.

Parsons for the plaintiff in error. The contending parties upon this record are, the administratrix of the late prebendary of the stall of *South-Grantham*, in the cathedral of *Salisbury*, to which the advowson of *Wetby* belongs; and the succeeding prebendary; and the question is, who has the right to present for this turn only to the church which was vacant in the lifetime of the

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late prebendary. It has been suggested, and may be admitted, that it lies on the plaintiff to prove her right, and that if she fails in doing so, it is immaterial whether the defendant has the right or not. With a view, therefore, to defeat the plaintiff, other claims besides that of the defendant have been brought forward, viz. those of the king, the Bishop of *Salisbury*, as supposed patron of the stall, and the Bishop of *Lincoln*, as bishop of the diocese in which the church is situate (who, however, be it remembered, disclaims upon this very record).

In order to shew the plaintiff's right in this case, it will be attempted to establish to the satisfaction of the Court, first, that where the patron is lay, if a presentative church becomes vacant, and the patron dies without presenting, his executor, and not his heir or devisee, or the next owner of the advowson, shall present, and the reason is, because the moment a church becomes vacant, the turn is separated and disannexed from the advowson, is a chattel, and is vested in the person of the individual to whom the advowson at that moment belongs.

Secondly, that, assuming the patronage to be ecclesiastical, still the same law prevails in all cases, except where a bishop is patron, and then the king, by his prerogative, takes the turn as guardian of the temporalities of the bishopric.

Thirdly, that there is not any valid objection on the ground of this advowson being supposed to have been always in ecclesiastical hands; for, first, prebendaries need not have been ecclesiastics before the 13 & 14 *Car. 2. c. 4. s. 14*. Secondly, this is a rectory, and advowsons of rectories were all originally in lay

lay hands, or the hands of some bishop. Wherever the tithes had always been in ecclesiastical bodies, vicarages, and not *rectories*, were endowed by them. Thirdly, even if the advowson always was in ecclesiastical hands, its descent is regulated in this country by the temporal law, and not the ecclesiastical; and, fourthly, even the ecclesiastical law of this country would not give the turn in this case to the successor.

Lastly, it is proposed to establish that the supposed intention of the donor cannot affect this case: First, because nothing is known as to the donor, the time or circumstances of the grant, nor could any evidence be gone into upon this record, framed as it is, if any thing were known. So that no particular intention of the particular donor can be relied on. Secondly, because there is nothing to raise a legal presumption of a general intention in all donors to sole ecclesiastical corporations, that an actual ecclesiastic should always present. If there were, the grantees of such ecclesiastical corporations could never have presented by law, which they have done and may do. Thirdly, any such general intention would equally apply to the donors of advowsons appendant to manors, as to which it is constantly violated, and they are disappended. Fourthly, if any such general or particular intention could be shewn, it could not prevail against the known rule of law, that a corporation sole cannot take a chattel by succession.

As to the first point, it is clear that where the owner of the advowson is a layman seised in fee, and dies during the vacancy of the church, the turn goes to his executors, and not to his heir, *Watson's Complete Incumbent*, chap. 9. 1 *Burn's Ecclesiastical Law*, tit. *Advowson*, p. 13. *Benefice*, p. 138. (This, as a general position, was admitted

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by the defendant in error.) It may, nevertheless, be necessary to cite some of the authorities, because the reasoning upon which they proceed is applicable to this case. In *Stephens v. Wall and Another* (a), it was holden by *Harper, Weston, and Dyer*, that "the grant of the present avoidance is void, because it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right, power, and authority, and also a chose in action, and in effect, the fruit and execution of the advowson, and not any advowson, and yet executors shall have it by privity of law. And to this opinion, afterwards, *Cattlyn C. J., Carus and Southcot Js.* agreed; but *Walsh* e contra; and to his opinion *Saunders C. B. and Whiddon J.* afterwards assented." The opinion of those six Judges is adopted by *Gibson, Cad. 797. tit. 33. c. 1. s. 5.*; and so in *Fitz. N. B. Quare Impedit*, 34. B, it is said, "The heir in tail shall not have a presentment fallen in the life of the tenant in tail, but the executor of the tenant in tail." And, again, in *Fitz. N. B. 33. P.* this reason is given, "If a man be seised of an advowson in gross or in fee appendant unto a manor, and the advowson void, and he dieth, his executor shall present and not the heir, because it was a chattel vested and severed from the manor, &c. But if the bishop die, and the advowson happen void before his death, the king shall present unto the same by reason of the temporalities, and not the bishop's executors;" and so in *Bro. Abr. tit. Presentation à l'Eglise*, 34, citing 21 H. 7. c. 21. "Quare impedit; fuit agree que l'homme veint à l'advowson in fee, l'eglise voide, il devy l'executer avera le presentation et nemy heire." The void turn is like rent

(a) *Dyer*, 282 b.

due, or any other fruit fallen, *Digby v. Ritch* (a). Rent due vests in the reversioner, in respect of the reversion; but if he dies after the rent is due, and before payment, it passes to his executor, who does not take the reversion, because the rent is disannexed from it, and vested in the person of the then reversioner. [Lord Tenterden C. J. Do you find any case of rent going to the administrator or executor of a prebendary?] No, but it does not appear to have been ever disputed, and the stat. 28 H. 8. c. 11. gives the rent during vacancy to the successor. A grant of the next turn during vacancy is void, and a grant of the advowson equally void, quoad the vacant turn, *Bishop of Lincoln v. Holford* (b). But a grant of an advowson during vacancy is good, and does not affect the vacant turn, for it is disannexed from the advowson, *Agard v. The Bishop of Peterborough* (c), *Stephens v. Clark* (d), *Hill v. The Bishop of Exeter* (e). In the *Queen's, Fane's*, and the *Archbishop of Canterbury's* case (f), the patron was outlawed; the church became void, the Queen claimed, and set up a grant of Edw. 4. of goods and chattels of outlaws. The Queen's counsel said that this special chattel would not pass by general words. *Anderson J.* so held, "for they extend only to such things which are commonly known and understood by such words. By grant of goods, chattels real do not pass." But *Baron J.* said, "This interest is a chattel; for if the church became void, and before presentment the patron died, his executors shall have the presentment, for that it was a chattel vested in their testator." In

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(a) 1 Brownl. & Gouldsb. 167.

(b) 5 Burr. 1505.

(c) Dyer, 129 b.

(d) Moore, 89.

(e) 2 Taunt. 69.

(f) 4 Leon. 109.

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Holland v. Shelley and others (a), the grantee of the goods of outlaws claimed the next avoidance, and no objection was made as to the sufficiency of the words "bona et catalla." Again, in *Ca. Litt.* 180; it is laid down, that if a feme covert be seised of an advowson, and the church becometh void, and the wife dies, the husband shall present, but otherwise it is of a bond made to the wife, because that is merely in action." So where the husband is tenant by the courtesy, and the church becomes void, and the husband dies, his executors and not the heir shall have it. 38 E. 3. c. 36. *Bro. Presentation à l'Eglise*, 18. In *Fitz. N. B. Quare Impedit*, 34. N, it is said, "If a vicarage happen void, and before the parson presents he is made a bishop, &c. yet he shall present to this vicarage, because it was a chattel vested in him." That case is precisely similar to this, for there it is assumed that the parson is patron in right of his parsonage. It is admitted, that in some cases quare impedit may be brought by an executor, but there is no case expressly in point as to quare impedit, either by the executor or administrator of a prebendary; neither is there any instance of such a proceeding by the successor. In the case of *Repington, Executor, v. The Governors of Tamworth School* (b), a distinction was taken as to donatives. The case was as follows:—*A. B.* seised of the advowson of a donative, church voids. *A. B.* dies, and his executor sues, supposing himself entitled, as in the case of a presentative benefice. Judgment against the plaintiff. It was said by the Court in giving this judgment, "that before the council of *Lateran* all benefices were like what do-

(a) *Hob.* 302. *Winch.* 692., nom. *Holland v. Bishop of Chichester*.

(b) 2 *Wils.* 150.

natives are now, that no lapse could have occurred in ancient times, and that bishops had no right of institution before the time of *Ric. 2. (a)* Ante concilium Lateranense (1179) (says *Bracton*), nullum currebat tempus contra presentantes, *Seld. Hist. Titles*, cap. 12. fo. 980. And the Chief Justice Sir C. Pratt (Lord Camden), said, that the author of the *Codes* never read this chapter of *Selden*, or he has imposed upon the public: he said there is no case in the books to exclude the heir of a donative from his turn in this case, that a patron of a donative can never be put out of possession by an usurpation. And after verdict for the plaintiff, judgment was arrested." But the chapter of *Selden* there cited, shews only that lay patrons did not present to the bishop, but invested the incumbent themselves. Whether the executor or heir invested in the case of the ancestor's death, during the vacancy of the church, is no where alluded to.

The reason of the decision in 2 *Wils.* is not to be found; and to argue back from that decision, that the heir must formerly have had the right against the executor in all cases is manifestly unsound. In all probability that report is very incomplete; in the declaration some prescription was laid, and as the verdict was for the plaintiff, that prescription must have been found by the jury, and yet the report does not notice it. But there is a great distinction between donative and presentative livings. In the former there is no lapse, the particular right to the void turn remains for ever until the church is filled up: there is nothing to distinguish the duration of that right from the general right of nomination, and therefore the void turn may be considered as constituting part of the general right, and on

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(a) By mistake for R. 1.

that

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that account may go with the advowson to the heir, in a representative living the void turn does in a certain time lapse, and is therefore considered as severed from the advowson. All these authorities are applicable to the present case, for the patronage is substantially lay, inasmuch as a prebendary need not formerly have been an ecclesiastic. In *Bland v. Maddox* (a), it was agreed clearly that a layman may be presented to a prebend; for non habet curam animarum; and *Coke* said, all the possessions of prebends were at first the bishop's, 7 *Ed. 2. pl. 5.*, 30 *Ed. 3. pl. 26.*, and de mero jure do belong to the bishops. There is no exception of prebendaries in 13 *Ediz. c. 12.* concerning reading articles, and yet if a prebendary read not the articles within the time limited by that statute his promotion is not void. The reason is, because it is not a benefice with cure of souls, and a layman might have been presented to a prebend (b). So also, in former time, a layman might have taken a title to a deanery, prebendary, or other benefice, without cure, *Fairchild v. Gair* (c). But now the contrary is provided by the 13 & 14 *Car. 2. c. 4. ss. 13, 14.* And in this statute, section 29., there is a remarkable provision, "that the statute shall not be prejudicial to the king's professor of law in the University of Oxford, for or concerning the prebend of *Skipton*, within the church of *Sarum*, united to it by King James."

Secondly, assuming the patronage to be ecclesiastical the same rule prevails. The right of the owner of an advowson cannot depend on the mode of becoming

(a) *Cro. Eliz.* 79.

(b) *Cowley's Laws concerning Recusants*, 253. *Watson's Clergyman's Law*, chap. 2. 9.

(c) 1 *Brownl. & Gouldsb.* 201.

owner, whether by grant, descent, devise, or office. It is absurd to say that the character of the person who exercises the right can alter the nature of the right, although it may put the party under some personal peculiarity in that exercise. As, for instance, with respect to varying presentations, an ecclesiastical patron cannot present one, and revoking that presentation present another. The bishop must give notice of refusal to a lay patron, not to an ecclesiastical (a). It is said that this is an ecclesiastical trust to be exercised only by an existing prebendary, being an ecclesiastic. This cannot be so, for there are many instances of prebendaries making grants of the next turn of a living of which they were patrons, and of the granters and their assignees, although laymen, and sometimes tracing their title through executors, bringing actions of quare impedit in their own names, *Stanhope v. The Bishop of Lincoln, Williams, and Adamson* (b), *Byng v. Bishop of Lincoln, Halsey, and Primett* (c), *Dayly v. The Archbishop of Canterbury, Bishop of Norwich, and Mason* (d), *Webster v. The Archbishop of York and Woodroffe* (e), *Hill v. The Bishop of London and Others* (f), *J. N. v. Bishop of Bath and Wells* (g), *Adamson v. The Bishop of Lincoln and Others* (h), *Overton v. Syddall* (i), where there was an exception of the advowson. It is true that these are entries of pleadings, and not decisions; but in *Radcliffe v. Dayly* (k), *Ashurst J.* says, "The form of declarations is very material in a case where no direct determinations can

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(a) *Burn*, tit. *Benefice*, 157.(c) *Winch.* 853.(e) *Coke*, *Entr.* 507.(g) *Rastall*, 522.(i) *Coke*, *Entr.* 122.(b) *Winch.* 825. *Hob.* 237.(d) *Winch.* 905.(f) *Coke*, *Entr.* 508.(h) 2 *Brown*, *Entr.* 233.(k) 2 *T. B.* 636.

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be found one way or the other; for the form of legal proceedings is evidence of what the law is." In *London v. Southwell* (a), where a prebendary demised his prebend, an advowson belonging to it was held not to pass, not because it was illegal to demise it, but because the words were not sufficient. This goes the whole length of the present case, because it shews that the notion of the donor having restricted the right of presenting to an actual prebendary is fanciful; and it is observable that the Court says, that the words "commoditatibus, emolumentis, proficiis, et advancementis," are insufficient; "all which four words are of one sense and nature, implying things gainful, which is contrary to the nature of an advowson regularly; yet an advowson may be yielded in value upon a voucher, and may be assets in the hands of an executor." If it be held, that where the advowson is in the hands of an ecclesiastic, an executor cannot present; it is impossible to account for the power which an archbishop has to devise his options, to which there is no objection, *Potter v. Chapman* (c). It was said in the Court below that such right was an anomaly, but there is no ground for that: it is consistent with and confirms the cases cited from *Watsh*, *Coke*, and *Hobart*. In *Shallwood and Another v. The Bishop of Coventry* (d), the plaintiffs, executors of *John Sida*, brought quare impedit for the archdeaconry of *Derby*, and counted upon a grant of the next turn made to their testator by the defendant: it was held, first, that the grant was good against the grantor, though bad against his successor; secondly, that the action for disturbance

(a) *Winch.* 810. *Hob.* 304.(b) *Winch.* 692.(c) *Ambl.* 98. 1 *Burn*, *Ecc. Law*, tit. *Bishops*, 239.(d) *Cro. Eliz.* 207. 4 *Leon.* 15. *S. C.*

in the time of the testator was within the equity of the 4 Ed. 3. c. 7., for it was a chattel that should go to the executor if the disturbance had not been.

The next question is, whether the present case is to be assimilated to that of a bishop dying during the vacancy of a church of which he is patron. In such case it is laid down, that neither the bishop's executors nor the successor shall have the turn, but the king, *Ge. Hist.* 90 *an.* *Potten v. Chapman* (a), *Vin. Abr. Presentment* (C. 2) (E. 2), *Mall. G. Imp.* 69. Lord Coke at 90 a., gives as the reason, "because it is a chose in action," but this is plainly not the true reason; for, as *Hargrave* observes in note 85. to this passage, "it is not that choses in action are in their nature incapable of transmission to executors, for the contrary is known to be law;" and, indeed, in this very page, Lord Coke states, "that the bishop's executors shall have a wardship fallen in his life and not raised, for albeit the bishop hath the seigniorie ten aiter droit, yet, the wardship being but a chattel he hath in his own right, and a chattel cannot go in the succession of a sole corporation, unless it be in the case of the king." Now a wardship is expressly here called a chattel, and it is manifestly as much a chose in action as the next avoidance; this, therefore, is not the true reason of the king's right. But Lord Coke, at 866 a., speaking of the same matter, says that the bishop's executors shall have the wardship, but not the next turn of the church; for nothing can be taken for a presentment, and therefore it is no assets. *Hargrave*, in his note 85. on *Co. Lit.* 90 a., seems to think this the true reason, and takes the distinction between a trust coupled with a

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(a) *Ambl.* 98.

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Thirdly, there is not any valid objection to the plaintiff's claim on the ground of the advowson having been always in ecclesiastical hands; for, first, as has been shewn, the prebendary *might have been* a layman; secondly, the living of *Wetly* is a rectory; and the advowson or patronage of all rectories must have been originally in lay hands; and if it be found now in the hands of an ecclesiastical corporation, aggregate or sole, it must have come into such hands by grant from the original patron. In *Co. Litt.* 119 *b.* it is said that "the advowson of a church is the right of presentation or collation to the church;" and upon the word "Advocatio," it is said, "so called because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church, viz. ratione foundationis, where the ancestor was founder of the church; or ratione donationis, where he endowed the church; or ratione fundi, as where he gave the soil whereupon the church was built; and therefore they were called advocati. They were also called patroni, and thereupon the advowson is called jus patronatus." And by *Burn's Ecclesiastical Law*, tit. *Appropriations*, it appears that where a church was from the first in the hands of ecclesiastics, they (that is, the aggregate body) received the tithes, and sent curates to officiate; at first in circuits, then to some particular church, and afterwards these curates became vicars with vicarages endowed or perpetual curates; but the ecclesiastical body kept the tithes, or a portion of them, in their own possession; there is no instance of their creating a rectory, giving all the tithes to the officiating minister, and keeping only the advowson. If that be so, then ecclesiastical

bodies

bodies can only have rectories by grant from the founders. Now the founder could only grant what he had, viz. the lay fee in the advowson, and it would be liable to all the incidents of a lay fee. A layman could not reserve any other right than that of patronage, for he could not take the tithes to his own use. Vicarages, on the other hand, were created by ecclesiastical bodies, who had obtained grants of rectories. In *Lyndewood's Provinciale Constitutio Othoboni*(a), chap. *de Intrusis*, this distinction between rectories and vicarages is recognised. In the commentary on the word *collatio* he says, "Et nota quod nil de presentatione patroni laici in hac parte loquitur, innuendo presentationem vicarie ad laicum patronum pertinere non posse, sed ad patrum seu prelatum ecclesiasticum duntaxat." And after assigning a reason for this, the commentary proceeds: "Scias tamen super jure patronatus rectoriarum de lege regni; quia idem jus uniformiter pertinet ad patrones et laicos." Thirdly, supposing this church to have been always in ecclesiastical hands, still the right of presenting must be governed by the temporal and not the ecclesiastical law. In *Doctor and Student*, dial. 2. ch. 26. p. 191., it is said, "It is holden in the laws of the realm that the right of presentment to a church is a temporal inheritance, and shall descend by course of inheritance from heir to heir, as lands and tenements shall, and shall be taken to be assets, as lands and tenements be." And in c. 59. p. 326. "The goods of spiritual men be temporal, in what manner soever they come to them, and must be ordered after the temporal law, as the goods of temporal men must be." Coupling this with the former

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(a) p. 96.

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passage, it shows that a void turn being a chattel must go to the executor of the patron. In the report of the judgment in the present case, delivered by *Best* C. J., in the court below (a), several authorities are quoted to establish that the ecclesiastical law, and not the temporal, must prevail in this case. According to that report the Lord Chief Justice is made to say, "Lord *Coke*, in 1 *Inst.* 344., says, the ecclesiastical law is to prevail where it is not against the common law or any custom." The passage in the original is as follows: "Lex, spiritual, &c. That is, the ecclesiastical laws allowed by the laws of this realm, viz. which are not against the common law (whereof the king's prerogative is a principal part) nor against the statutes and customs of the realm; and regularly, according to such ecclesiastical laws, the ordinary and other ecclesiastical judges do proceed in causes within their conusance:" in which passage there is nothing to warrant the conclusion said to have been drawn from it. Again, in p. 273. of that report, the law is thus stated: "Ecclesiastical presentations, having no connection with lay property, but existing only as rights of the church, are governed only by the laws of the church. The ecclesiastical law is for the decision of such questions, and must be taken notice of by the judges of the courts of common law in deciding them;" and for this, *Edes v. The Bishop of Oxford*, *Vaughan's Rep.* 21. and 24., is cited; but no such passage is there to be found. But, fourthly, even the ecclesiastical law would not give the right of presentation in this case to the successor. In the report before alluded to, *Lyndewood de Consuetudine*, p. 19., is thus

(a) 3 *Bingh.* 271.

quoted

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quoted in support of that position. "Si beneficiatus decedat intestatus, et non disponat de fructibus de jure communi ecclesia in eis succedat. De consuetudine tamen posset esse quod per episcopum vel alium ad quem pertineret bona testatorum tueri, deberent distribui ad decedentis debita solvenda." Referring to *Lyndewood*, it appears that the passage is essentially different; it stands thus: — "Sed quero quid si rector vel hujusmodi beneficiatus decedat intestatus et non disponat de fructibus? Dic, quod de jure communi ecclesia in eis succedet. De consuetudine tamen," &c. (a) The author is there discussing a constitution of archbishop *Edmund*, forbidding rectors to dispose of the fruits before *Lady-day*, and the whole of the argument is to shew that a rector may at any time by will dispose of all fruits received, and after *Lady-day* of all fruits to be received during the year, because he has done the duty during the winter when there were no fruits; and he says the object of the constitution was, to pay debts and legacies; and after arguing the question, whether in the case of an intestate not indebted, the custom shall prevail, he sums up thus: — "Ex predictis patet quod licet nulla sint decedentis legata vel debita, et sic cesset causa consuetudinis, non tamen cessabit ejus effectus, sed quod fructus ipsi aliunde disponantur pro salute animæ suæ per eos qui alia bona sua administrabunt, et non pertinebunt ad ecclesiam vel ad successorem, nec ecclesia nec successor poterit ipsos fructus (stante talī consuetudine) vindicare, nisi forsitan consideratione alicujus debiti." In the report in 3 *Bing.* it is assumed, that *Lyndewood* says the fruits "pertinent ad successorem."

(a) *Oxford* edition, p. 26.

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Lastly, the supposed intention of the founder cannot affect this question. It appears to have been assumed in the court below, that the advowson of the rectory of *Welby* belonged to the bishop or church of *Salisbury*, and was by the bishop or church given to the stall of *South Grantham*; and that the gift was so restricted that no one should ever present to the rectory who was not at the time prebendary of *South Grantham*. It is easy to arrive at conclusions by assuming premises, but for this assumption there is not the slightest ground appearing upon the record. One of the learned Judges in the court below is supposed to have relied upon certain facts, as to the grant of the living, not appearing upon the record; but his judgment could not have been correctly understood, for there is no rule of law more inflexible than that, on demurrer and writs of error, the facts are to be taken from the record and the record alone. If there were any facts affecting the case they should have been pleaded, in order that they might have been submitted to a jury, or to the judgment of the Court. Secondly, ecclesiastical history determines nothing as to this question. *Dugdale's Monasticon*, which is said to have been relied on in the court below, is evidence only, and if it contained any thing to the purpose it should have been pleaded; and that book was rejected, even when produced as evidence, to prove a matter as to which original records might have been obtained, *Staines v. Burgesses of Droitwich* (a). Thirdly, advowsons appendant are constantly disannexed, and become in gross, and then a vacant turn confessedly goes to the executor when the manor goes to the heir; but in that case the intention of the donor must have been, that the turn should go with the manor;

(a) 1 *Salk.* 281.

and,

and, fourthly, if the donor did restrict the right, so that in case of a prebendary dying during vacancy his executor should not present, but the successor, such restriction would be void, being repugnant to the grant. A new mode of descent cannot be created otherwise than by the intervention of trustees, *Litt. s. 31. Co. Litt. 25 a. 27., 223 b. n. (132.)* Sir *Anthony Mildmay's case (a)*, 3d resolution: *Corbet's case (b)*, *Co. Litt. 145 b.* Corporations aggregate, whether lay or ecclesiastical, never die; and therefore no argument is deducible from cases where such corporations are patrons. But a prebendary is a corporation sole, and except in the case of the King, a corporation sole cannot take a chattel by succession, *Co. Litt. 9 a. 90 a.* In the same book, 46 b., it is laid down, "If a lease for years be made to a bishop and his successors, yet his executors or administrators shall have it in auter droit; for, regularly, no chattel can go in succession in a case of a sole corporation, no more than if a lease be made to a man and his heirs, it can go to his heirs." It is plain, therefore, that the successor in a sole corporation is as the heir of a natural person, *Fulwood's case (c)*, *Arundel's case (d)*, *Vin. Abr. Corporation (L).*

In the court below several minor objections to the plaintiff's right were taken, which it may be proper briefly to notice. It was said, first, that the declaration avers that the right belongs to the prebendary in right of his prebend. It does so as to the advowson, but not as to the next turn. Secondly, that there is no personal representative of a prebendary, as prebendary. That is true, but the turn was in him individually. Thirdly, that the pre-

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(a) 6 Co. 41 a.

(b) 1 Co. 84 a.

(c) 4 Co. 65.

(d) Hob. 64.

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bendary's rights were as a member of the church of *Salisbury*. This would be true if the advowson had belonged to the corporation aggregate, but the contrary is averred on the record, and not denied. Fourthly, that the cases in the books of entries were just after the Reformation, and remnants of popery. But the Reformation did not alter the law of *England*: and it is manifest, from the restraining statutes of *Elizabeth*, that up to that period churchmen might alien. Fifthly, that it might as well be contended, that if one of the chapter, whose turn it was to present, died, his executor should present. But that case is wholly different, for there the presentation is by the whole body, although the nomination, by arrangement amongst themselves, is in the particular member. So, also, the cases put in 3 *Bing.* 266. apply only to legal rights vested in the corporate body, but exercised by particular members. The argument as to supposed inconvenience cannot have any weight; for in this, as in all other cases, the ordinary will take care that an improper person shall not, if presented, be instituted; and even if there were any inconvenience, in allowing the void turn to be disposed of by a layman, that could not alter the rule of law.

(1) *D'Oyley Serjt. contra.* The right of patronage in this case went to the successor, and not to the personal representative of the deceased prebendary. The question applies exclusively to ecclesiastical matters, and there is not any decided case by which it can be governed; it must, therefore, depend upon principle only. Ecclesiastical rights are anomalies in the law of this country, and the rules applicable to them are exceptions from those established in other cases. Thus an ecclesiastical interest

interest is for life only, and yet the party interested may have some writs and remedies, applying only to estates of inheritance; thus he may have a writ of waste. And he has some peculiar privileges; he may prescribe in non decimando, which a layman cannot do. An ecclesiastic, on the other hand, is under some disabilities not attaching to laymen. He cannot vary in his presentation, although a layman may. "Fit etiam devolutio ad episcopum quando per patronum clericum presentatur indignus; non tamen fit devolutio quando scienter presentatur indignus per laicum." *Lyndewood Prov.* 215. *de Jure Patronatus*, verb. *Devolvatur*. As these differences exist between the situation of a lay and ecclesiastical patron, it is not to be assumed that the void turn in question goes to the personal representative of the deceased prebendary, although such turn would go to the executor of a lay patron. It is difficult to ascertain upon what foundation this rule of law stands. In general, the rights of executors and administrators extend only to personal property. A right of presentation cannot come strictly within the description of personal property as assets. In *Co. Litt.* 388 a. it is said, "If a bishop hath a ward fallen and dieth, the king shall not have the ward, nor the successor, but the executor, and the ward shall be assets in his hands, &c. But if a church become void in the life of a bishop, and so remain until after his decease, the king shall present thereunto, and not the executor or administrator; for nothing can be taken for a presentment, and therefore it is no assets." And the same appears by the case of *London v. The Chapter of the Collegiate Church of Southwell* (a).

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(a) *Hob.* 304.

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And guardian in sequestrum shall not present, because nothing can be made of the right (a). Again, although in some places a void turn is called a chattel, yet it is not always so treated. In *Ch. Lit.* 90 a. it is said, "And yet, if a bishop have an adwosson and the church become void, and the bishop die, neither the syncessor nor the executors shall present, but the king: because it is but a chose in action." And in note 85. on that passage, Mr. *Hargrave* states, that "chose in action are not in their nature incapable of transmission to executors; but that in the case of a chose in action so peculiar as a right of presentation, the law favours the king more than the bishop's executors." He then observes, "But then it may be asked, why the king should not have the preference, in case of the bishop's being entitled to a wardship by knight's service in right of his see, and dying before reducing it into possession by seizure? The answer may be, that the law distinguishes between an interest both of profit and trust, as wardship by knight's service is, and one merely of trust, such as a presentation." He afterwards adds, "However, as a like reason might be urged against executors in favour of an heir, it is most safe to rely on the right of the king, as settled by authority and long practice." All Mr. *Hargrave's* reasoning is against the right of the executor. Why, then, should not his right be considered as resting upon authority and long practice, rather than upon any sound intelligible principle? That authority and long practice do not apply to the present case, for there is a wide difference, as has been already shewn, between ecclesiastical and lay patrons.

(a) *Ch. Lit.* 79 b.

Besides,

Besides, it is now generally agreed, that private and lay patronage arose in this manner. When the lord of an extensive domain built or endowed a church, he was allowed to name the incumbent; and then the general right of patronage descended with the estate to his heir, (although such a right might, by a separate grant, be disannexed from the estate, and then the right of patronage became an advowson in gross.) But a vacancy in the church having happened during the life of a patron, who died without filling it up, the question arose whether the right for that turn devolved upon the heir, or the executor. If it were *res integra*, there would be strong grounds to contend for the right of the heir, the void turn not being a subject of profit which can benefit the personal estate of the testator, and the heir having a greater interest than the executor in appointing a fit person to the church. The contrary, however, is stated to be the law in *Fitz. N. B.* 33. P, Q. But it is observable, that in the note (g) to that passage, said to have been by Sir M. Hale, four references to the Year-books are given, 9 H. 6. 83., 4 Ed. 3. 2., 39 Ed. 3. 21. 44 Ed. 3. 1; and the first three are said to be against, and the fourth alone in favour of the position in the text. So also in *Bro. Abr., Presentation à l'Eglise*, pl. 34., it is said, that where a man is seized in fee of an advowson, and the church becomes void, and he dies, his executor shall present, and not the heir; and 21 H. 7. 21. is referred to; but it there appears as an obiter dictum, and not as the point in issue. In modern times no doubt has ever been raised as to this matter; but in these old cases, upon which the rule of law depends, no reason for that rule is given. Sometimes the void turn is compared to a fruit fallen, not very accurately,

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curately, for no profit or pecuniary advantage can be derived from it; sometimes it is compared to the next avoidance, which is said to be a chattel; sometimes it has been said to be a thing severed from the advowson. The rule, however, has certainly prevailed in the case of presentative livings in the hands of lay patrons, but it does not appear to have extended to any but those. Even in the case of a donative, which differs but little from a presentative, the law is different. The same rule of law as to granting a void turn applies to both, and the void turn of a donative is at least as much like a fruit fallen as that of a presentative, and yet there it was held that the right of presentation went to the heir, and not to the executor, *Repington v. Tamworth School* (a). It has been suggested that the judgment probably proceeded upon some prescription which is said to have been laid in the declaration; but no notice of that prescription is taken in the judgment, nor could the judgment have proceeded upon it, for the prescription was introduced, if at all, by the plaintiff, the executor, and found for him, but the judgment was against him. Nor can that decision be accounted for by the circumstance of there being no lapse in the case of a donative, for the patron of a presentative living may present after the expiration of the six months, if the church has not been filled by the ordinary. The more probable ground of the decision is, that the Court, not being fettered by any precise authority as to a donative, decided upon principle. So in this case there is not any decided case by which the Court are bound to give judgment for the plaintiff, and the right of patronage of the living in

(a) 2 Wils. 180.

question being vested in the prebendary in his ecclesiastical character, is a sufficient reason for holding that the trust ought to be executed by the successor. In the case of a private patron, it may be indifferent to the public whether the heir or executor presents, but where the right is given to a church dignitary, the public have the pledge of his character and station, that the trust shall be well executed; and it is important that the right of presentation should not be disannexed from the person of the ecclesiastical patron. Most of the cases cited on the other side respecting the right of the executor have proceeded upon the notion that the void turn is a chattel, a chose in action, a thing in action and effect, a fruit fallen, &c.; and the same reason has been given for the rule preventing the grant of a void turn; but in the case of the *Bishop of Lincoln v. Wolforstan* (a), Lord Mansfield and Wilmut J. say, that the true reason why a grant of a fallen presentation or of an advowson after avoidance is not good, quoad the fallen vacancy, is the public utility, and the better to guard against simony; not for the fictitious reason of its then being become a chose in action. The same ground of public utility is sufficient to warrant a decision in this case in favour of the defendant. The rule of law, following from the principle there laid down, is, that where the right is annexed to the person, the law will not take it from him. Thus, in *Co. Litt.* 120 a., where it is said, that "if a feme covert be seised of an advowson and the church cometh void, and the wife dieth, the husband shall present;" the observation applies, that at the time of the vacancy the right of pre-

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(a) 3 Burr. 1512.

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sentation became annexed to the husband, and the subsequent death of the wife could not disannex it. The same principle is applicable to the case put in *Mallory, Qua. Imp.* 70., of a manor with an advowson appendant, being in the king's hands: the church becomes vacant, the king grants the manor with the advowson; the king shall present, and not the patentee. And this rule satisfies the greater part of the cases cited for the plaintiff. Where the king has the right of presentation to a church becoming vacant in the time of a bishop, the patron, who dies during vacancy, it is said that the king has this right by prerogative as guardian of the temporalities, but he takes it as belonging to the see, and not as part of the goods of the deceased bishop; in that case, therefore, the void turn cannot be considered as a chattel vested in the person of the bishop without relation to his office. Neither can it, in this case, be considered as having vested in the person of the deceased prebendary, without relation to the prebend. And if that be so, it must go with the prebend to the person of the successor. There is not any analogous case in which the right to present to a vacant office goes to the executor. The incumbent on a living has a right to appoint the parish clerk, but if that office (in which the clerk has a freehold interest) is vacant, and the incumbent dies during the vacancy, it never was contended that his executor should appoint. So in *Strogges v. Coleskill* (a), where a question arose as to the office of exigenter of *London*. That office became vacant when Sir *R. Brooke* was Chief Justice of the Common Pleas; during the vacancy of both the offices, Queen *Mary* granted the former to *Coleskill*, and on the same day Sir *A. Browne* was appointed Chief Justice,

(a) *Dyer*, 175 a.

and he refused *Coleshill*, and appointed *Skrogges* to the office of exigenter. The dispute was referred to the Judges of the Courts of King's Bench and Exchequer, and the Attorney and Solicitor General, and they decided that the appointment belonged to the Chief Justice for the time being, as an inseparable incident belonging to his person. Suppose the Lord Chancellor (a corporation sole) were to die, leaving several livings vacant, the Crown would not present, nor his executor. The argument on the other side is, that the void turn is severed from the advowson, and is therefore a chattel, and therefore cannot go with the inheritance. How then does it go with the inheritance in the case of a donative? Again, it has been already shewn, that where a church is vacant, a bishop being patron in respect of the temporalities, and he dies before presentment, the king shall have the presentation and not the bishop's executor, *Mall. Qua. Imp.* 65. And if the king die, his successor shall have the temporalities and not his executor, and yet it is but a chattel, *Bro. Abr. Prerog.* pl. 85. So also where the king is entitled to a presentation *in à vice*, and dies, his heir shall have it who is king, and not his executor, *Bro. Abr. Pres. à l'Eglise*, 11., 7 H. 4. 25. And if the king has an advowson in fee which voids, and during the avoidance the king grants the advowson in fee, the king shall not present to this avoidance (a). It is true, that Lord Hale in his note doubts whether this would be so unless the grant contained words applicable to the avoidance; but still the position that the void turn is severed from the advowson cannot be correct; for, in *Fitz. N. B.* 33. S., it is said, that "If a man have a

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manor unto which an advowson is appendant in fee, and the church void in the father's time, and the father die, and his heir in ward to the king, the king shall have the presentment." In that case the advowson goes to the heir, but the heir being an infant, the king has the care of the church and the void turn; the advowson and the void turn therefore go together. Supposing the void turn to be properly called a chattel, that by no means proves that it may not go with the advowson in the case of a common person, for many chattels go with the inheritance; as charters, muniments, deer in a park, or fish in a pond; and in like manner the furniture of a bishop's chapel goes to his successor, and not to his executor, *Bishop of Carlisle's case* (a). It may not be unimportant in this case to consider the origin of church patronage. Originally, the patron who founded a church, had the sole right of judging of the fitness of the person whom he nominated to fill it, and neither presentation, institution, nor induction were necessary, *Selden on Tithes*, c. 12. s. 2. All livings were, therefore, originally in the nature of *donatives*, nor was this altered until after the Council of *Lateran*, in the 25 H. 2., when, according to *Bratton*, b. 41 s. 9, a great change took place. Until then the doctrine of lapse was unknown, and *donatives* still remain exempted from it, which confirms the idea that all livings were originally of the same nature. Nor is it unimportant that the pleadings in this case describe the prebend as belonging to the church of *Salisbury*, and that the advowson is claimed in right of the stall. For in *Gibson's Codex*, tit. 80. c. 13., *Of Appropriation*,

(a) 21 Ed. 3. 48., cited in *Corwen's case*, 12 Co. 106.

s. 2., it is said, that "the person appropriating was of necessity a spiritual person, so as no other might do it." In s. 3. that appropriations could be made to no other than to spiritual persons; and in s. 4. that "appropriations might be made to no spiritual persons, but as spiritual bodies politic or corporate." And this agrees with *Grendon v. The Bishop of Lincoln* (a). The argument, therefore, that a prebendary might have been a layman, is of no avail; it rather shews that the advowson must have been appropriated to the dean and chapter of *Salisbury*, and not to the stall. [*Bayley J.* The pleadings do not admit of that argument.] Even if it could be annexed to the stall, the prebendary was restrained by the 13 *Eliz. c. 10.* from making any grant of it which could bind after his life; he could not have devised it; and the administrator can only claim what might have been devised, so that even if at common law the claim of the present plaintiff might have been good, it cannot prevail since the restraining statutes were passed. The case of an archbishop's options does not apply; in the first place, they were introduced by *Cramer*; the legality of them has never been solemnly determined; in the case in *Ambl.* no person was interested in disputing it; besides, the bishop who made the grant might be estopped, and it has never been pretended that the grant would bind after the death of the grantor. Even if it were held that the prebendary might, in his lifetime, make a binding grant of the next turn, it would not affect the defendant, inasmuch as no grant was here made; if he could not make such a grant, that is conclusive in the defendant's favour.

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(a) *Plowd.* 498.

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With respect to the supposed inaccuracies in the report of the judgment delivered in this case in the court below, they are quite unimportant. The passages are certainly not correctly set out, but the substance of them is correct, and the only error was in printing them as quotations; and in *Lyndewood*, as to the disposition of fruits in cases of intestacy of incumbents, and in *Doctor and Student*, as to the disposition of the property of clerks; such property as would be assets is evidently intended, and not spiritual patronage, of which no profit could be made; for in the first place the payment of debts is contemplated, and then the purchase of masses for the soul of the deceased.

Patteson in reply. No attempt has been made on the other side to overturn any of the points submitted on behalf of the plaintiff. The argument has been principally directed to shewing that a void turn is not, properly speaking, a chattel severed from the advowson; but that is established by an infinite number of authorities, and the cases where by prerogative or custom the person who takes the advowson has also the right of presentation to the void turn, are mere exceptions out of the general rule of law. The void turn does not go as part of the advowson, but is given by prerogative. If the turn be a chattel, it must continue so whoever is patron. Nor is the case of a void turn the only one in which an assignment cannot be made after the event upon which the right accrues has happened; rent (to which this fruit of the advowson has been likened) cannot, after it is due, be released by one joint-tenant to the other, *Brookesby v. Wickham* (a).

(a) 1 Leon, 167.

The argument as to all livings being formerly donatives is not founded upon any authority; *Selden* speaks of *special donative* chapels as exceptions, and *Bracton* says, "Ante concilium Lateranense nullum tempus currebat contra *presentationes*." It would be singular if that passage could be taken to prove that no presentations had before then been made. The case of the parish clerk has no application to this, for it cannot be shewn what interest the incumbent has in the right of presentation. Neither is *Strogger v. Colehill* an authority in point, for the Chief Justice was held to have the right of appointing to the office of *exigent* by *prescription and usage*. The defendant's case was as little aided by the supposed instances of chattels going with the inheritance, and not to the personal representative of the deceased. They were all instances of *heir-looms*; and in *Corven's* case that of the furniture in the bishop's chapel is expressly put on that ground. Lastly, the restraining statute 13 *Elix.* c. 30. was relied on; but if the argument be correct that the right of presentation became severed from the advowson as soon as the vacancy happened, that statute cannot affect the question. The advowson belonged to the prebend, and therefore could not be alienated, but the void turn being severed from it, and vested in the person of the prebendary, would go to his personal representative.

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Cur. adv. vult.

The learned Judges not being agreed in opinion, now delivered judgment *seriatim*.

LITTLEDALE J. The question raised upon the defendants' plea, to which there is a demurrer, is, if there be a
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prebendary of a prebend to which the advowson of a church is appendant, and the church becomes void in the lifetime of the prebendary, and he dies without presenting to the church, whether the successor of the prebendary is entitled to present? But that point need not be decided, because, though if the affirmative of that be true, it would be an answer to the plaintiff's declaration, yet supposing it not to be true, the defendants have a right to shew, that, even though the right be not in the successor, yet it is not in the plaintiff. And, therefore, the point comes more properly to be considered on the plaintiff's declaration, and upon that the question is, "if there be a prebendary of a prebend to which an advowson is appendant, and the church becomes void in the lifetime of the prebendary, and he dies without presenting to the church, whether the executor or administrator (as the case may be) of the deceased prebendary be entitled to present?" For if not, it is quite immaterial to the plaintiff's claim whether the right be in the successor, or in the king, or in the bishop of the diocese in which the prebend is, or in the bishop of the diocese in which the rectory is. I may, however, say that though the question is upon the plaintiff's right, yet the dispute is in effect between the plaintiff and the successor to the prebend; because there does not appear to be any ground for the claim of the crown, except that if no one can establish a legal right, the presentation would belong to the king as the head of the church. There seems no ground for the claim either of the bishop of *Lincoln* or *Salisbury* as there is no lapse, no such right is set up, and it is not necessary to enter into any discussion to show that such right could not be supported. It is admitted on both sides that this is the

first

first case in which the question comes to be decided in a court of justice; and it must be considered in what way presentative benefices have been treated in the decisions which have taken place in cases which have any resemblance to the present, and in the opinions of text writers of authority. There is no doubt that in case of a benefice presentable for institution, if a person in his own right, as contradistinguished from his corporate rights, be seised in fee or in tail of an advowson appendant to a manor or other estate, or of an advowson in gross, and the church becomes void in the lifetime of the patron, and the patron dies, the church still being void, the executor shall present, and not the heir, *Brooke's Abr. tit. Presentation al Eglise*, 34.; *Fitzherbert, Presentment d l'Eglises*, 7.; *Fitzherbert's N. B.* 33, 34.; *Co. Litt.* 388 a.; the Queen, *Fane*, and the Archbishop of Canterbury's case (a); *Comyn's Digest, Eglise*, H2., where he mentions it as of his own authority; admitted in the case of *Repington v. The Governors of Tamworth School* (b); recognized in the case of *Holt v. Bishop of Winchester* (c), where the case was, that if a man seised in fee of an advowson be parson of the church, and dies, his heir, and not his executor, shall present; for though the advowson doth not descend to the heir till after the death of the ancestor, and by his death the church is become void, so that the avoidance may be said to be severed from the advowson before it descend to the heir, and vest in the executor, yet both the avoidance and the descent to the heir happening at the same instant, the title of the heir shall be preferred as the elder. But that recognizes the general proposition,

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(a) 4 Leon. 106.

(b) 2 Wils. 150.

(c) 3 Lev. 47.

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though in the particular case the title of the heir is to be preferred. How the presentation came to belong to the executor, and whether it would not have been as well if it had been held to belong to the heir, it is now too late to enquire; the law has been so long settled, and has been so repeatedly admitted, that it would be most dangerous to think of disturbing it. The reason assigned in *Fitz. N. B.* 33., for its going to the executor is that it is a chattel vested and severed from the manor, and in 4 *Leon.* 109. it is called a chattel. In *Wentworth's Office of Executors*, 54., it is said that the next presentation before it becomes void is a chattel real, and after, it is a personal chattel. The language of six Judges in *Stephens v. Wall* (a), (where the question was, whether the present avoidance of a church could be granted by a subject) is, that the grant of the present avoidance was void "because it was a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right, power, and authority; and also a chose in action, and in effect, the fruit and execution of the advowson, and not any advowson, and yet executors shall have it by privity of law." The principal case was, whether the present avoidance of a church could be granted by a subject, and six of the Judges to whom the above expressions are attributed, held that it could not; but though the other three Judges differed, I do not understand that to be as to what is there said by six of the Judges, but only as to the point itself in discussion. However the law has since been recognized according to the decision in *Dyer* as to the principal case, *Co. Litt.* 120 a., 3 *Burr.* 1515. The case itself is recognized in

(a) *Dyer*, 282.

Brokesby v. Wickham and the Bishop of London (a), 1827.
 There are other cases also besides these of executors of tenants in fee or in tail where the void turn is treated as a chattel. If a woman be seised of an advowson and marries, and she and her husband have issue, though the right of patronage descends to his heir, and though the wife never presented, and died before the church became vacant, the right of presenting is vested in the husband during his life, as tenant by the curtesy, though his wife had but a seisin in law, because he could by no industry obtain any other seisin. And if the church in this case becomes void during the life of the husband, and he dies during the vacancy, the heir shall not present, but the husband's executor; and if, the church being void, the wife dies not having had issue, so that the husband is not tenant by the curtesy, yet he shall present to the void turn as being a chattel, *Co. Litt.* 29 a. 120 a. 388 a. *Bro. Present. at Eglise*, 18—22. *Watson, Incumbent*, c. 9. And in *Fitz. N. B.* 34. "If a vicarage happen void, and before the parson present he is made a bishop, &c., yet he shall present to this turn, because it is a chattel vested in him." This last position of *Fitzherbert* shews that in his opinion it was as much a chattel in case of an ecclesiastic as in any other case.

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The plaintiff therefore contends, that as this is a chattel vested in her, in her quality of administratrix, the right to present is in her. But though the law be not doubted by the defendant, to the extent of the cases to which it has been carried, yet he says that it is not founded on principle, and should not be carried beyond the cases already decided. And he says the present-

(a) 1 Leon. 17.

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ation ought not to go to the executor, because it is not assets; and for this may be cited *Co. Litt.* 388 a, "Nothing can be taken for a presentation, and therefore it is not assets;" *Co. Litt.* 120 a, "It is not merely a chose in action;" *Fitz. N. B.* 33, "And if there be guardian in socage of a manor to which an advowson is appendant, and the church becomes void, the heir shall present and not the guardian, because he cannot account for the same." So *Co. Litt.* 17 b. guardian in socage shall not present to an advowson, because he can take nothing for it, and cannot account for it, and he shall not meddle with any thing he cannot account for; *S. P.* in *Co. Litt.* 89 a.; and there the reason given that he can make no benefit of it is, that the law doth abhor simony; and the same reason is given in *The Bishop of Lincoln v. Welforstan* (a). But as to this point the cases of guardians do not apply, because their duty is to account for what they make, and, of course, they cannot meddle with what they cannot turn into profit. But it is otherwise in the case of an executor. An advowson is assets in the hands of the heir, and the right of the next presentation to a church which is full, is assets in the hands of an executor; both these are allowed by the law to be sold, but a void presentation is not. The meaning of assets is, that it may be converted into money, which a void presentation cannot be; but the reason of that is, not that it is a chose in action, but because the law against simony prevents its being sold, which otherwise it might be. In 3 *Burr.* 1516, Lord *Mansfield* and Mr. Justice *Wilmut* say, that the true reason why a grant of a fallen presentation is not good, is the public utility; and the better to guard against simony; not for the fictitious

(a) 3 *Burr.* 1514.

reason of its having then become a chose in action. In the case of *London v. The Collegiate Church of Southwell* (a) it was said that a lease by a prebendary, under the words "commodities, emoluments, profits, and advantages to the prebend belonging," the advowson of a vicarage would not pass, because these words imply things gainful, which is contrary to the nature of an advowson. But the report goes on, "yet an advowson may be yielded in value upon a voucher, and may be assets in the hands of an executor." But the case was decided on the particular meaning of the words used, denoting something gainful. No question was made, but that if proper words had been used the advowson would have passed. And there can be no doubt whatever, that the next presentation, if the church be full, is of value, and would be saleable by law, and would be assets in the hands of an executor; and the only distinction between a presentation where the church is full or void, is, that in one case it is not simoniacal to sell it, and in the other it is. But though it be not saleable as the subject of profit it is not the less a chattel, or the less belongs to the executor. An outstanding term to attend the inheritance, or a term in trust for other purposes, cannot be made the subject of sale, or be made available assets in the hands of the termor, but they go to the executor. It is also contended by the defendant, that the rule does not hold universally, even in the case of lay patronage; for that in the case of donatives the right of presentation vests in the heir and not in the executor, as was decided, after two arguments, in the case of *Repington v. The Governor of Tamworth School* (b). Though the

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(a) *Hob.* 303.(b) 2 *Wils.* 150. It appears by the case of *Collins v. Saurcy*, 4 *Br. P. C.* 692, that *Repington* was both heir and executor of the deceased patron.

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case must have been very much discussed, the grounds of the decision are not given at length; but it was said, "that before the council of *Lateran* all benefices were like what donatives are now; that no lapse could have occurred in ancient times, and that bishops had no right of institution before the reign of *Richard 2.*" "*Ante concilium Lateranense,*" says *Bracton*, "*nullum currebat tempus contra presentantes,*" *Selden's History of Tithes*, c. 12. fo. 380. When *Richard the Second* is mentioned in *Wilson* it must be a mistake in the reporter; it should be *Richard the First*.

It will require some detail of the history of the church in earlier times, and of lay patronage and lay investitures, and the law of lapse, to shew how what is stated in *Wilson* could be any ground for the presentation being adjudged to the heir; but, when that is done, I think it will appear that the decision is quite proper, and founded upon the original state of church patronage and the law of lapse, and that the short minutes of the reporter, when expanded into a fuller explanation, were really what was the substance of the decision.

It will be seen, however, by what I am about to state, that though the law of lapse took place nearly about the same time as the right of institution by the bishops, yet that they were measures wholly unconnected, though both of them are applicable to the right of the heir in the case of donatives.

In the early ages of Christianity, the bishops had probably the appointment and regulation of the inferior clergy, who were to perform divine service, and to preach in such places as the bishop thought best calculated to promote the cause of religion, and they were to be paid out of the funds which went to the common treasury of the diocese, and over which the bishop had the disposal
for

for himself, his clergy, the poor, and the repairing of churches. But in the early centuries of Christianity there were no compulsory payments; no tithes were paid, and the whole of the funds depended upon voluntary donations and oblations made from time to time, or the produce of lands which had been given to the church. The countries of Christendom were not in the earlier times divided into parishes as they have since been, and the ministers of the church had neither permanent places in which they were to discharge their ecclesiastical duties, nor had they any permanent funds allotted to their maintenance and support. What are now called ecclesiastical livings were at that time unknown, and the early ages of Christianity will afford no guide in considering the rights of parties to church presentation or appointment. By degrees the funds of the church became increased, territorial possessions were from time to time given to religious houses, or otherwise for the purposes of religion, and about 400 years from the birth of our Saviour tithes began to be paid in some places; and in the seventh century some churches were endowed with the perpetual right to tithes; and some provincial ordinances, but by no means general, were made for their payment. After about eight centuries, the payment of them became more frequent, and consecrations of them made from time to time to churches and religious houses, as is stated in *Selden on Tithes*; and in these centuries there were some provincial constitutions of the clergy directing the payment of tithes; these, however, were probably not much more attended to than the inclination of persons led them to do, but that inclination, no doubt increased among all classes. In the year 855 there is a charter of *Ethelwolf*, in which, with

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with the consent of his bishops and his primate, he directs some tithes to be given to the church; but what was the exact language of this charter and the extent of the ordinance, the older historians are by no means agreed. Different kings after him, before the conquest, made different orders for the payment of tithes; but it is by no means clear that the payment of them was even then altogether general or compulsory. Soon after the conquest the payment of them seems to have become general, though not always to the churches of the parishes where they arose. That council of *Lateran* which was held in 1215, endeavours to alter some usages which had prevailed to the contrary, and directs all payments in future to be made to the parish church; but it seems doubtful whether this obligation to pay to the parish church was fully established till the general council of *Lyons* in the year 1274. Tithes, however, were not the only possessions of the church. Lands were from time to time given for religious purposes. Some were given to religious houses, that they might dispose of the profits. The clergy are said at one time to have had their general residence in the same place with the bishops, except when they were on their missions; but by degrees, as devotion increased, the clergy came to reside more permanently in particular places, and some persons gave their tithes, and others appropriated their land for their support, and others built churches; and persons would become more willing to endow the church founded chiefly for the use of themselves and their families and tenants, if they could have the liberty of giving the incumbent there resident a special and several maintenance, instead of the former community of the clergy's revenue remaining. There is no doubt but

but the bishops would give their sanction to these foundations, and the profits of the several churches would be restrained to the incumbents. It does not very well appear when these lay foundations began in *England*. It appears from *Selden's History of Tithes*, c. 9. s. 4., that the first instance that occurs is about the year 700, and he says, that about the year 800 many churches, founded by laymen, are said to have been appropriated to the Abbey of *Crowland*, and by this time probably lay foundations had become very common, and parochial limits assigned to the incumbents; though from other parts of *Selden's* work it seems that the payment of tithes did not always correspond to the parochial divisions till some centuries afterwards.

When gifts were first made to the church, and churches founded by laymen, it does not always appear to have been done through pure devotion. For in some countries of Christendom, at least, the patron sometimes arbitrarily divided part with the incumbent, and what the incumbent did not receive, the patron took to his own use, and by different councils of the church lay patrons were forbidden from making such a disposition. The lay patrons, however, in their new created churches, claimed a right of collation or investiture, whereby the incumbent might receive full possession without the aid of the bishop or other churchman; and notwithstanding some imperials were made against this course of proceeding, the lay patrons could not be prevented from claiming the patronage, and they took upon themselves not only the advocacy or advowson, that is, the defence or patronage of the incumbent's title, but also the collation by investiture, without presentation, at any vacancy. And the right of advow-

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son whereto the right of investiture was in these times annexed, the bishop in some places confirmed to the patron by putting a robe or some other thing upon him at the dedication. And from this right of collation and patronage reserved by lay patrons, the practice came to be, that parish churches, and all the temporalities annexed to them, as the glebe and tithes, were at every vacancy conferred by the patron on the new incumbent by some ceremony of investiture, with these words, "accipe ecclesiam," or the like.

Upon these presentations the bishop did not institute as has been done since. And the incumbent as really, fully, and immediately received the body of his church, and his glebe, and such tithes as were joined with it in point of interest, from the patron's hands, as a lessee for life receives his lands by livery of the lessor.

These investitures by lay patrons were very objectionable to the church; and in a general council at *Constantinople* in 870, some attempts were made to prevent them; and in the council of *Rome*, in 1078, further regulations were endeavoured to be made against them: there is a canon against them, and in the council of *Lateran*, in 1119, many decrees were made to the same effect; and soon after a general council, which was held in 1138, they became less frequent, and institution now and then followed upon presentation. And as the canons acquired force, and the papal power increased, it appears to have been out of use about the year 1200, but till then it was not left off.

So, also, *Selden* in his *History of Tithes*, c. 12. s. 5. says; "But after such time as the decretals and the increasing authority of the canons, about the year 1200, had settled the universal course here of filling churches by

by presentation to the bishop, or as it seems it sometimes was to the archdeacon, or to the vicar of the bishop, as guardian of the spiritualities, that use of investiture of churches and tithes severally or together, practised by laymen, was left off, and a division of ecclesiastical right from thence hath continued in practice. Neither did the king afterwards, much less common persons, fill their common parochial churches without such presentments to bishops, — parochial churches, for of special donative chapels we here speak not; neither were appropriations of churches and tithes afterwards allowed that had not confirmation from the ordinary, immediate or supreme."

Up to this time, therefore, benefices were donative. The patrons had the whole of the advowsons in their own hands; they invested the incumbent with the full possession of the church, either severally or together, and the incumbents were in the nature of lessees for life under the patron. There was then no law of lapse, and the investiture of the incumbent might take place wherever it suited the patron, though the patron, by ecclesiastical censures, might be compelled to fill the church. I do not find any statement that in these times the patrons took the profits of the benefices to their own use; but there can be no doubt that it was so, because, in the case of donatives, even now when the rights of the lay patrons are so much less than formerly, the patrons are entitled to take them; though, according to *Selden*, they cannot institute any suit for the recovery of them if they are refused to be paid. Some few donatives there are at the present day, whether they were suffered to continue as they formerly were at the time when the investiture by lay patrons was discontinued, or whether

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whether they have been since founded by letters patent, or licence from the crown, or whether there are some of each, I cannot at all say.

In the twelfth century the law of lapse was introduced. A general council was held at *Lateran* in 1175, at which, our *Selden* says, in c. 12. s. 5. as last cited, four bishops were sent, according to custom, as agents to the church of *England*. And *Bracton*, lib. 4. 241. says, ante concilium Lateranense nullam currebat tempus contra presentantes. Lord *Coke*, in 2 *Institute*, 273. and 361., notices that *Briton* and *Fleta* describe the council as having been held at *Lyons*, and not at *Lateran*, as *Bracton* does, but it is not material where it was held. *Selden*, however, says, "by that council, after vacancy of six months, the chapter is to bestow those churches which the bishop being patron had left so long void, and upon their default the metropolitan. But no word is of lay patrons in it; yet by reason of the authority of that council, and a decretal of the same pope, (Alexander the third) which speaks of like time upon default of lay patrons, it hath been since taken here generally that, after vacancy of six months, the next ordinary is regularly to collate by lapse." It appears, therefore, that nearly about the same period of time the discontinuance of investitures by laymen, the law of lapse, and the payment of tithes in the parishes where they arose, were introduced. These measures, however, were wholly unconnected with each other, though they all arose from the increasing authority of the church and the force of the canons.

In the case of donatives, which I consider all benefices of lay patronage to have been, and, as I have before endeavoured to shew, as long as the right of institution

institution was in the patron, the complete dominion remained with the patron. When the church is vacant, he is entitled to take the profits to his own use, but he has no remedy to compel payment, and if a stranger takes them, the patron cannot bring an action for them, but must put in a clerk, who is to sue. It is said by *Popham C. J.* in *Fairechild v. Gaire (a)*, that the patron may take the profits, and sue for them in the spiritual court, and though the other Judges differ with *Popham*, yet I consider their point of difference to apply to his opinion, that if the patron will not collate, there is no remedy to compel him, but he is left to his conscience; for when they are said to be contra, they say that the ordinary may compel him to collate a clerk, and give their reasons, but, as they say nothing about the patron taking the profits, I do not understand them to differ upon that point. The same point was put in argument in *Britton v. Ward (b)*, where it is said that when the church is void, the patron may take the profits to his own use, if the parishioners will pay them, but he has no remedy to compel them to pay their tithes to him. The same case of *Britten v. Ward* is reported in *Cro. Jac. p. 515*, but there called *Britten v. Wade*, and there it is also said, "but if any take the profits from him he cannot maintain the action, but he ought to put in his clerk, and he maintain the action;" but the language there is that the patron of a donative may lose the profits if he will; that is evidently a mistake, it is not proper *English*, and is not consistent with what follows: the mistake seems to arise from the translator taking the French word to be *perdre*, instead of *prendre*,

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it is *prendre* in *Rolle's Reports*; and in *Mallory's Quare Impedit*, 35., where this case is cited, he says the patron may take the profits. So also *Burn*, in his *Ecclesiastical Law*, title "*Vacation*," says that in case of donatives the patron may take the profits during the time of vacation.

Donatives may be resigned by the incumbent to the patron, *Fairchild v. Gaire*, as before cited in *Yelverton*, 60., and *Cro. Jac.* 65., where the Court held that a donative begins only by the erection and foundation of the donor, and he hath the sole visitation and correction, the ordinary nothing to do therewith; and, as he comes in by him, so he may restore to him for unum quodque eodem modo quo colligatum est dissolvitur. And although the presentee, when he is in, hath the freehold, yet he may revest it by his resignation, without any other ceremony, and the ordinary hath nothing to do therein. And in the Year-book 6 *Hen. 7. c. 14.*, *Keble* says, that if the founder ordain that he and his heirs shall present, then the ordinary shall have nothing to do with it; and *Brooke, Presentment al Eglise*, in referring to the Year-book just cited, says, where a free chapel donative is void the founder may retake it, and need not appoint any other incumbent.

The old history of the church, as well as the more modern cases, treat donatives as being the entire property of the patron; if the church be void, the freehold is in him, though perhaps upon consideration of all the authorities on both sides, he may be compelled by ecclesiastical censures to fill it, but in the meantime he may enter upon the glebe and take the profits of that and the tithes; and if he may take them, his heir may take them after his death, as the foundation of the church

church is on behalf of himself and his heirs; and as there is no lapse in the case of donatives, this taking of the profits may continue till the church is filled; but if the executor could collate to the church, that would be adverse to the right of the heir to take the profits; and I think that from the whole of the law of donatives the right to collate is in the heir, and does not at all clash with the right of the executor as to benefices, which are presentative for institution. And though it may be said that the right of presentation is as completely severed from the advowson in case of a donative as in a presentative living, I do not so consider it, as the nature of a donative is such that the whole vests in the patron and his heirs, who may take the profits during the vacancy, and, therefore, the executor has nothing to do with it. But the defendant contends, that supposing the case of the donative to be accounted for by any means as constituting a well founded difference from a benefice presentable for institution, yet that the case of ecclesiastical persons having benefices in right of their church is at all events different, and the first instance that is shewn is the case of a bishop who in right of his bishopric has an advowson, and the church becomes void and he dies, the king shall present. For this are cited 2 *Rolle's Abridgment*, 345. "If a church of the patronage of the bishop void in the time of the bishop and after the bishop dies, the king shall have the presentment by reason of the temporalities, and not his executor;" *Brook's Abr. Presentation al Ecclesie*, 10., "Where the avoidance is of a benefice belonging to the bishop, and he dies before he makes collation, the king shall have it by reason of the temporalities of the bishop, and not the executors of the bishop."

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advowson, and an avoidance happens, and after the tenant dies, his heir in ward to the king, the king shall have the presentation and not the executor of the father, though the heir be of full age, 2 *Rolle's Abr.* 345. pl. 1.; and in *Co. Litt.* 388 a., if the king's tenant by knight's service in capite be seised of a manor, whereunto an advowson is appendant, and the church become void, the tenant dieth, his heir within age, the king shall present to the church, and not the executor or administrator; but if the land be holden of a common person, in that case the executor shall present and not the guardian. So in *Co. Litt.* 90 b., in speaking of the king's right he says, So it is, in case where the king hath wardship, but that is a prerogative that belongeth to the king, to provide for the church being void; for where the tenure by knight's service is of a common person, the executors of the tenant shall present where the avoidance fell in the life of the tenant. And so if the tenant of the king has an advowson and an avoidance happens, and the tenant presents and his clerk is admitted and instituted, and before induction the patron dies, and the advowson comes by wardship to the king, he shall present, for the church is not full against him before induction, 2 *Rolle's Abr.* 345. Other cases may be put, though not applicable to the case of executors, where the king's prerogative gives him a right to present where a subject would not. As if the youngest daughter, coparcener, be in ward to the king, and the church becomes void, the king shall have the presentment alone, and not the other coparceners, 2 *Rolle's Abr.* 344. pl. 8. These cases, therefore, which are excepted out of the rule, that executors shall present where the chattel is vested, must be confined to those cases where the king, by his prerogative,

rogative, has a right to present either in the instance of his being guardian of the temporalities in the cases of bishops, abbots, and priors, or in the instances of the king's tenants in capite, where he has the wardship. In all these instances, the question has been between the king and the executors; and in case of the bishop, no surmise (except that in one of the cases there mentioned) was ever made, that the successor would have the presentation in case the king had not been entitled by his prerogative.

Another exception to the rule is alleged, that in case of a person holding an office, in right of which he presents to another office, and that other office becomes void in the lifetime of the patron, and the patron dies, his successor, and not his executor, shall appoint to the office; and the case of *exigenter* is put as reported in *Scraggs v. Coleshill*, *Dyer*, p. 175. To that case I entirely agree; but the reason of that is, that it is a personal thing annexed to the judge of the court who is to appoint the officers of the court; and if the office becomes vacant, and the judge dies, his executor can have nothing to do with the appointment, for it belongs to the judge to appoint the officers of the court. The office of judge is not like an advowson, which is a thing which descends and is capable of being conveyed from one person to another, and the presentation of which is the fruit of the advowson. But if an advowson be annexed to an office and the church becomes void, and then the person holding the office dies, I think the right to present would be in the executor and not the successor, because it would be a fruit fallen, a chose in action personally vested in the officer.

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If the principle be established, that a vacant presentation is a chose in action, and is like a fruit fallen, and goes to the executor of a private patron, I do not see why it should not go to the executor of a prebendary patron. He is seised of the advowson itself in right of his prebend in his corporate capacity, and as long as the prebend remains in him, he has it in his corporate character. But it is only the prebend itself, and the advowson which he has as such; the proceeds of a prebend stand upon a different ground. These proceeds do not belong to him in his corporate character, for if they did, they could only be enjoyed by him while he exercises that character. The produce of the lands, such as corn, hay, fruits, and vegetables, come to him to be eaten, consumed, or sold at his pleasure. So the rents of the lands of the prebend, when they fall due, are to be received by him for his own private use, and not to be laid out on his prebend, but at his own pleasure. In the case of death, such of these issues and profits as remain fallen or due, but have not actually come into the hands of the prebendary, do not go to the successor, or the king, or the ordinary, but go to his executors, as any other part of his personal property. The reason is, because these things, by being severed from the prebend, become chattels, and are no longer parcel of the prebend; and no persons, who afterwards have any interest in the prebend, either direct or incidental, can claim what has thus been severed from it. The same rule holds as to the issues and profits of any thing which is appurtenant to the prebend, and which become chattels, such as proceeds of fisheries, common of turbary, housebotes, and other things which have been taken and remain in specie

at

at the death of the prebendary: for things appurtenant to the prebend are as much parcel of it as if they were of the actual corpus of it. The general principle of such manual chattels and choses in action as I have mentioned being admitted, it is to be considered, whether the right of presentation to a church is to be considered in the same light. In the case of a private individual, if for *prebend* you substitute *manor*, there is no doubt upon the current of all the authorities. The species of property is the same: in the one case it is an advowson appendant to a manor, in the other it is an advowson appendant to a prebend in right of the prebend. But in both cases it is an advowson, and being an advowson, it must partake of the qualities applicable to an advowson.

In the case of lay patronage the vacant presentation becomes severed from the inheritance; but if that be the nature of an advowson, that a right to a presentation becomes severed from the inheritance, it must have that quality throughout, to whomsoever the advowson belongs, or in whatever right it is held; for otherwise great confusion would ensue. And if it be a chattel it must go as all other chattels do. A chattel does not go to the successor of a corporation sole, except in the case of the king, *Co. Litt.* 90*a*. But the king is altogether upon a different footing from other corporations sole. If, then, this be a chattel and should go to the successor, it would be quite an anomaly, and an exception to the general rule.

But there is one very important instance where the right of presentation is transmissible to the personal representatives, and does not go to the successor. I mean the option of the archbishop, which is founded on a

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grant made to the archbishop; and upon the death of the archbishop during the continuance of the bishop in his see, it will devolve on his executors or administrators; that being a personal grant to the archbishop, is different from the present; but it proves, that in the highest ecclesiastical dignity in the church the principle, in one instance at least, is recognised, that it is transmissible to the personal representatives.

It has been said that this is a trust to be exercised for the benefit of the church, and that it is more proper that a spiritual person should exercise it; but it is also an important trust if it be exercised by a layman, he, also, has a duty to perform in the selection he makes. The ordinary, both in the case of ecclesiastical and lay patronage, is to examine into the fitness of the clerk, and the only thing that can be said in favour of the ecclesiastic is, that he will make a better choice; but that is not a principle upon which the legal rights of parties can be decided. The state of patronage is as much diversified in *England* as it is possible to be; all classes in the community that can be enumerated have patronage belonging to them, and their rights are to be determined by legal principles; and where there has been no decision or practice or received opinion, then by analogy, as far as can be collected; but the question, what class of patrons are likely to make the best choice, cannot, I think, be taken into consideration.

In the course of the argument it has been said, that this prebend has been appropriate to the church of *Salisbury*, and also that the will and intention of the founder is to be considered. As to that we know nothing upon this record; all we know is, that the advowson is appendant to the prebend; but how it became so does

does not appear, or who was the founder, or what were the terms of the foundation, or by what statutes it is governed: if there were any terms or statutes they might have been shewn; if there were none, the case must be governed by the general rules of law.

Neither can we look to the constitutions of the church of *Salisbury*, — they are not stated in the record; and in the absence of any thing particular in them the rules of law, as applicable to all churches in general, must prevail.

The statute of the 28 *Hen. 8. c. 11.* has been adverted to. It states what things are to go to the successor of an archdeacon, dean, prebendary, parson, &c. &c., but the enumeration is of things growing, arising, or coming during the time of vacation; no allusion is made to any thing which fell during the time of the predecessor. This statute has been said to be only declaratory of the common law; whether it be so or not, cannot be material; because if it was, it would be a declaration of what the successor would take by the common law, which is only of things falling in the vacation. But as the statute directs these things to go to the successor, towards payment of the first fruits to the king, it would not enumerate things which could not be converted into money, and therefore would not include a vacant presentation, and the statute, consequently, does not affect the question.

For the reasons I have already mentioned, I think that the plaintiff is entitled to present in the present case, and that the judgment of the Court of Common Pleas should be reversed.

HOLROYD J. The question is on the right of the plaintiff, though the demurrer is to the claim of right in

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in the defendants set forth in the plea. The question is, whether the plaintiff, as administratrix of the deceased prebendary, is entitled to present? It is admitted, if the advowson had been in *lay* hands, the right would have been in the administratrix, and not in the heir; but it is contended that as it was in the prebendary (a person having an ecclesiastical station or office derived from the bishop), and in right of his prebend, *ergo*, as a body corporate, that it is in him as a confidential trust reposed in the body corporate or person holding the office, and not as an individual, and that it does not therefore vest in any person who is his personal representative as an individual; but, though a fruit fallen, that it belongs to his successor. If that were so, we might expect to find that the right to present would have been deemed so much a confidential trust in whoever is the prebendary as to be therefore inseparable from the office or station. But this, I think, is not so, as will, as it seems to me, appear by what follows. Even in the case of a bishop, where it goes not to his personal representative, it goes not to his successor, but vests in the king as guardian of the temporalities by his prerogative. In the case of a common person, by the vacancy the right to present on that turn becomes separated from the advowson, as a fruit fallen, it becomes a *personal* chattel in the person entitled; though he has the advowson *in fee*, it descends not with the advowson to his heir, in case of his death, but goes to his personal representative; and in case the right was in such common person before and until the vacancy by a grant of the next presentation, in which case the right would, until the vacancy has happened, be in him as a chattel *real*, the vacancy turns it into a chattel *personal*.

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Via. Exor. (Z), pl. 4. cites *Wentw. Exor.* 54. and 73. for this; like rent due, which on death goes to the executor, though the land or reversion goes to the successor, or heir, or devisee, according to *Digby v. Fitch (a)*. So a termor shall present, though after the term is expired, to a vacancy which happened during the term, *Fitz. N. B., Quare Impedit*, 33. A. It is a *chattel vested*, and not merely a chose in action, and therefore the husband shall *present* to a turn after his wife's death, on a vacancy happening in her life in her advowson, *although* he could *not sue* after her death on a *bond* to her, because that is merely in action, *Co. Litt.* 120 a.

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The *nature* of the right to present on a vacancy having fallen, is not changed by its being vested in a prebendary in right of his prebend, but the rules of law (such as its being a fruit fallen separated from the advowson, a right vested, a chattel personal and transmissible to executors, &c.) applicable to it from its nature, must, in like manner, still be applicable to it, unless we find some rule or principle of law established, such as the king's prerogative in the case of bishops, (and the prerogative is the sole ground on which the bishop's case is varied, as will appear from a case I shall state hereafter,) unless we find some principle or rule of law, I say, to prevent their being so applied, or to vary this right in the case of a prebendary from the same right in the case of a lay patron. And I think there is no such rule or principle of law to prevent their being so applied, or to vary the case of a prebendary from that of a lay patron.

In the case of a bishop, the nature of the right to pre-

(a) *Brownl. & Gouldsb.* 167.

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sent is not at all changed from what it would be in the case of a lay patron; but notwithstanding the nature of the right in each of those cases be the same, the established rule of law to be found in our books as to the king's prerogative, intervenes and applies in the one case, the bishop's, to deprive his executor, &c. of the right to present, which but for the prerogative applicable to the bishop's case the executor would have in the one case as well as in the other; but I do not find any where in our books any rule or principle of law applicable to the case of a prebendary, who is patron in right of his prebend, to vary it from the case of a lay patron, more especially as a prebendary might formerly have been a layman, according to *Bland v. Maddox* (a), and other authorities. Suppose an advowson of a presentative rectory to be conveyed by a lay patron to a prebendary and his successors in right of the prebend in fee, or to be conveyed to a lay patron in fee by a prebendary who has it in right of his prebend, *concurrentibus iis qui de jure requiruntur*; which conveyance in former times, before the restraining statutes, would have been good even against his successors, and would now be good against the individual prebendary himself, unless the advowson or right of presentation of a prebendary in right of his prebend can be shewn to be wholly inalienable, either on account of its being vested in him as a personal trust and confidence in the person who may be the prebendary or otherwise. Would the nature of the right to present be varied, when a vacancy has happened? would it not be equally a fruit fallen and separated from the advowson, a right vested, a chattel personal, whether the patron be ecclesiastical or lay, and consequently

(a) *Cro. Eliz.* 79.

transmissible to executors, &c. in one case as well as in the other? unless there be found some established rule or principle of law to intercept it, as in the case of a bishop; and it does not appear to me that there is any such rule or principle of law established applicable to the case of a prebendary. None such is any where, that I know of, to be found.

That an advowson or right of presentation of a prebendary in right of his prebend is not at common law wholly inalienable or inseparable either on account of a personal trust and confidence in the person who may be the prebendary, or otherwise, appears, I think, by our books.

His being an ecclesiastical corporation, does not render it inseparable, for *F. N. B.* 34. O, shews that the vacant turn is not inseparable from the station or office of a prior, though an ecclesiastical and corporate office, so as where a vacancy has happened, to vest in his successor. For there it appears that the founder of a priory shall have a *quare impedit* against a sub prior, and the convent, if they disturb him to present to an advowson which belongeth to the house, if it void during the vacation where the founder ought to have the temporalities during the vacation. So in *Poyner v. Chorleton, Dyer*, 135 a. (cited also in 3 *Wils.* 327.), it appears that the grantee of abbot and convent, of the next avoidance, recovered in *quare impedit*. *Winch's*, *Coke's*, and other entries, shew that ecclesiastical bodies and persons have been in the habit of granting away their spiritual preferment as well as lay persons, and that their grantees have been in the habit of suing in their own names. In the *Dean and Chapter of Hereford v. The Bishop of Hereford (a)*, a grant of the next presentation by dean

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and chapter, was held not good against the *successor*; but that was only by reason of the statute 13 *Eliz.*, and no doubt that it was good against the dean, the grantor himself, and his chapter. So in *Armiger v. The Bishop of Norwich (a)*, a grant of advowson for twenty-one years by a bishop, which he had in right of his bishopric, was held good against himself, but not against his successor, or against the king during vacancy, though confirmed by dean and chapter, but it was void against them only by reason of statute 1 *Eliz. c. 19*. In *Smallwood v. Bishop of Coventry* there was a grant of the advowson of an archdeaconry by a bishop to *A. B.* for twenty-one years, who assigned to *C. D.* vacancy in *C. D.*'s life, and disturbance of him in his life, his executors sued. By the report of that case in *Lutw. 1.* and also in *Sav. 94.* and 118. though the writ was quashed as informal, the right to sue was decided in their favour; and afterwards in an action (see *Cro. Eliz. 207.*) the grant was held good against the bishop that made it, though not against his successor, by reason of the statute, and the executors had judgment.

Why, then, is such a right not equally grantable by a *prebendary*, and separable from the office, either in deed or by act or operation of law upon death? &c. It is no more a matter of trust and confidence in him than in the other cases of ecclesiastical bodies or persons. But an estate or interest, though coupled with a confidence and trust, is still in law assignable and grantable; and such assignment or grant will pass the estate or interest for so long time as the same continues to subsist in the assignee or grantee, and the creator of the confidence or trust cannot by law deprive the estate or interest (even by express words and declaration) of

(a) *Cro. Eliz. 690.*

such assignable or grantable quality. It is so in conveyances of lands or tenements to trustees in fee, or for terms of years; and the estates will, if not assigned or granted away by them, vest by law in heirs, or executors, &c. as long as their respective estates continue to exist, whatever the conveyance or conveyor may declare shall be the contrary. So *Com. Dig. Grant* (C), says, "A present estate or interest may be granted, though it be accompanied with a trust, as guardian in chivalry or soccage may grant his guardianship," and cites 2 *Roll. Abr.* 46. H. So as to archbishop's options, which may be disposed of by his will, and will pass to his executors, as appears in *Potter v. Chapman* (a).

The case of a donative, supposing it to be a settled case, is to be considered as an exception, at least the rule of law in that respect not only has never been applied to a presentative right, but the very contrary. But there may be also this distinction, that according to the cases above referred to, a right of *presentation*, when a vacancy has happened in a presentative living, is not a mere *right or chose in action*, but is a *chattel personal and vested*; but it does not, that I am aware of, appear that the right of *nomination* is so, in the case of a donative. It may not be a *separate* thing or right from the advowson itself of a *donative*, when a vacancy has arisen, as in the case of a *presentative* living, but may, instead of becoming in law a right separated from such donative advowson, and a *chattel personal vested*, continue a right, part of the advowson, unseparated from, and merged in, the general right to the advowson, and to be exercised only by him who has that general right, unless where it has been expressly separated from such general right to the advowson itself by a grant or

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conveyance of the right of nomination on such next vacancy. This consideration alone would be sufficient to account for its not going to the bishop by lapse, although its not going to the bishop by lapse, I admit, is otherwise accounted for in our books.

But it has been urged that (besides that this is to be considered as a confidence and trust to be exercised only by such person as holds the prebend), the prebendary is a body corporate, and, therefore, that the right of presentation for that turn, though the vacancy arise in his lifetime, has vested in his successor, and not in his administratrix, who represents him only in his *natural* character as an individual, and not as a body corporate, but there is no authority or principle of law to support this position; on the contrary, the authority and principle of law appear to me to be directly in opposition to it. For in *Co. Litt.* 90 a, Lord Coke states this case: "A tenant holdeth land of a bishop by knight's service, which seignorie the bishop hath in the right of his bishopric, the tenant dieth, his heir within age, the bishop, either before or after seizure, dieth, neither the king nor the successor of the bishop shall have the wardship, but his executors. For albeit the bishop hath the seignorie en auter droit, yet the wardship being but a chattel he hath in his own right, and 'a chattel' cannot go in succession of a sole corporation, unless it be in the case of the king." So that a chattel could go in succession in the case of the king, though it could not in the case of the bishop; and although the seigniorie was in the bishop in auter droit, yet neither the king nor the succeeding bishop should have the wardship, because it was a *chattel*, and, therefore, the former bishop had the wardship as a chattel in his own right, and his executors shall have it, though
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the seignorie was in him as a bishop; and Lord Coke in p. 46. *b.* of *Co. Litt.* says, "If a lease for years be made to a bishop and his successors, yet his executors or administrators shall have it in *auter droit*, for regularly no chattel can go in succession, in a case of a sole corporation, no more than if a lease be made to a man and his heirs, it can go to his heirs." So that the rule extends to chattels, whether real or personal. And in 4 *Co.* 65. *a.* and 1 *Roll's Abr.* 515. L. the rule of law as laid down by Lord Chief Baron Comyns in his *Digest, Biens, C.*, from those authorities appears to be, that all chattels of a corporation sole, as a bishop, parson, &c., go to his executors or administrators, and not to his successor, and this according to Lord Coke, and as laid down by Comyns, extends to chattels in action as well as in possession. As the right now in question, therefore, was a fruit fallen, separated from the advowson, and a right and chattel vested in the deceased prebendary, I think that after his death it went to his administratrix, as it would have done if he had had the advowson in his own right as a mere individual, and not in his corporate character, and that it has not vested in his successor. It stands on the same footing, as it appears to me, with rent due to the deceased as prebendary, and remaining in arrear at his death, which would go to his administratrix, and not to his successor.

I think, therefore, that the judgment of the Court of Common Pleas should be reversed.

BAYLEY J. This was a writ of error from C. B. in a case of *quare impedit*. The declaration stated, that William Dodwell, D. D. was seised of the prebend or canonry of *South Grantham*, founded in the cathedral

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church of *Salisbury*, to which prebend or canonry the advowson of the rectory of the parish church of *Welby* (the church in question) belonged in his demesne as of fee, in right of the said prebend or canonry, that he presented *William Dodwell*, and died; that *Price* succeeded *Dr. Dodwell*, and died; that *Rennell* succeeded *Price*; that the church became vacant by *Mr. Dodwell's* death, whereby it belonged to *Rennell* to present; that he died intestate, without presenting; that administration was granted to the plaintiff, and that thereupon it belonged to the plaintiff as administratrix to present, but that she was hindered by the defendants. She complains, therefore, not of a disturbance in the intestate's time, but of a disturbance in her own, and the question is, Whether upon an advowson, circumstanced as this advowson is, if a right of presentation accrue in the lifetime of the prebendary, and he dies without filling it up, that right passes to his personal representative? The declaration does not describe the prebendary as seised of the advowson in right of the prebend or canonry, or indeed as being seised of the advowson at all; but it states him to be seised of the prebend or canonry in his demesne as of fee in right of the said prebend or canonry, and describes the advowson as belonging to the prebend or canonry, I think it must be taken that it was in right of the prebend and canonry only that *Mr. Rennell* had any seisin of or right in the advowson. But though the title to the advowson be in right of the prebend or canonry, the question is, whether the right of presentation, when a vacancy has happened, is still attached to the prebend and canonry, and to be exercised only in right of the prebend or canonry upon a continuation of the prebendary's estate in the prebend or canonry, or
whether

whether it does not become an independent personal right, vesting indeed in him because he was prebendary when the vacancy happened and the right accrued, but severed altogether from the inheritance and the advowson, and becoming in him a detached personal right, to be exercised by him in his own right, whether he should continue prebendary or not, and in case he should die without exercising it, transmissible by him as a personal right to his executors or administrators. The latter is the right which the declaration states. It does not state that Dr. *Dodwell* presented in right of his prebend or canonry, but simply that Dr. *Dodwell* presented; and upon the vacancy in question, it does not state that it belonged to Mr. *Rennell* in right of his prebend or canonry, but simply that it belonged to Mr. *Rennell* to present, and upon the best consideration I have been able to give this case, I am of opinion, that in the absence of any custom to controul it, this is the correct mode of statement; and that though the prebendary acquires the right of presentation because he is prebendary, and in right of his prebend or canonry, the right when once acquired becomes his own private personal right as the right to the underwood he has cut, or the grass he has mown, or the fruit he has gathered from his prebendal lands. I have no difficulty in saying that I came to the argument in this case with a very strong impression upon my mind against the plaintiff's right, but the light which was thrown upon the subject by the powerful argument of Mr. *Patteson*, and the authorities to which I have referred, have induced me to think that my first impressions were erroneous; and though I might think it would be better if the right were to be inseparable from the stall, I cannot find legal principles to carry me to that conclusion.

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The first point I shall consider is, what is the effect of a vacancy, in case of a presentative living, and I take it to be clear that it immediately gives a new personal right, a right arising from property in the advowson, but from the moment of its creation, ceasing to depend upon, or to be influenced by it. Whatever may become of the advowson, though the right to it instantly ceases, the right of presentation continues untouched. In the common case, where a church becomes vacant and the patron dies, the advowson descends upon his heir; but to whom does the right of presentation pass? To his heir? No; but to his personal representative. And why? Because it is no part of the advowson; it is a personal right yielded by the advowson, a fruit created by it, but it is no part of the advowson, it is wholly independent of it. *Fitz. N. B.* 33. P. puts the case and gives his reason. If a man be seised of an advowson in gross or in fee appendant unto a manor, and the church become void, and he die, his executor shall present, and not his heir. Why? *Because it was a chattel vested, and severed from the manor.* The same point, without the reason, is put 21 *H.* 7. pl. 6. *Bro. Present. à l'Eglise*, 34. If *A.* be tenant in tail of an advowson, and the church become vacant, and *A.* die, *A.*'s executor shall present, not the issue in tail, *F. N. B.* 34. B. If tenant in tail of a manor to which an advowson is appendant, make a lease (before or not within the statute of *H.* 8.) which will end with his death, and the church becomes void, the tenant in tail dies, so that the lease is become void, the lessee shall nevertheless have the presentment, 10 *Ed.* 3. (a) If I grant land,

(a) Taken from the index to the Year Book,—not to be found in the book itself.

to which an advowson is appendant to husband and wife in tail, the husband dies, the widow marries *J. S.*, the church becomes void, the woman dies without issue, *J. S.* shall present, for though the right to the land is wholly in me, the right to present is in him, 38 *H. 6.* 36 B. If baron be seised of an advowson in right of his wife, and the church become void, and the wife die before issue had, still the husband shall have the presentment, 21 *H. 6.* B. *Bro. Presentment à l'Eglise*, pl. 22. *Co. Litt.* 120. If a manor, with an advowson appendant, be assigned to a widow for dower, and she marry again, and the church become void, and she dies, her second husband shall present, 14 *H. 4.* 12. If whilst a church is void, the patron be outlawed in trespass, which works a forfeiture of goods and chattels, the king shall present, *Br. Presentment à l'Eglise*, 22. "If a man have an advowson for a term, and the church during the term become void and the term expire, the termor shall nevertheless present," *F. N. B.* 34 B. *Bro. Presentment à l'Eglise*, 22. Lastly, if a vicarage become void, and before the parson present he be made bishop, he shall nevertheless present, because *it was a chattel vested in him*, *F. N. B.* 34 N. These authorities appear to me to prove, beyond all question, that upon a common presentative benefice a vacancy creates a new right from thenceforth, detached from and independent of the advowson, and liable to go in a different line from the advowson; and the next point I shall consider is, what is the legal character of this right? And I take it to be a chattel, and a chattel only. I am aware that in different books different names are given to it, that it is called a personal thing, annexed to the person of him who is patron in expectancy at the time of the vacancy

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(a) *Owen*, 155. 1 *Leon.* 201. 4 *Leon.* 107.

the right which devolves upon the patron in case of vacancy where there has been no grant, and in such case *Brooke* considers the right granted clearly as a chattel. In 34 H. 6. 27. pl. 38. a grant of the two next presentations was made to *J. N.* and his heirs, and it was alleged upon the first vacancy *J. N.* presented, and upon the second his heir, and per *Moile J.* the heir had no title to present, for the executors ought to present in this case, and not the heir, notwithstanding the form of the grant. *Brooke* abridges this case, title *Chattels*, pl. 20. and *Estates*, pl. 51., and he has a similar case, title *Chattels*, pl. 6. and in each he gives as the reason, that the right to present in such case is a *chattel*. If one grant the two next presentations of a church to *A.* these are chattels, and if *A.* die the executors shall have them, not the heir, *Bro. Chattels*, pl. 20. A man grants the next presentation to a church to *A.* and his heirs, or lease for years to him and his heirs, the executor shall have this and not the heir, for the heir shall not have *chattels*, *Bro. Est.* pl. 51. A man grants to another the next presentation to a benefice, and the grant was to him, his heirs, and assigns; and, yet, it was admitted clearly that it was *but a chattel* notwithstanding this word *heirs*, for it is but for a term, and where a thing is *but a chattel*, this word *heirs* cannot make it an inheritance. The same law of a lease for twenty years to *A.* and his heirs, *Bro. Chattels*, pl. 20. In the cases I have mentioned from *F. N. B.* 33 P. and 34 N., the right to present, which accrues to the patron upon a vacancy, is called a chattel, and so it must have been considered, *Co. Litt.* 388. Indeed, how can an executor or administrator have any right to it, except on the ground of its being a chattel? The statutes relating to administrators, use the words "goods" only. By the

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13 *Ed. 1. c. 19.*, the ordinary shall answer the debts as far as the goods of the deceased will extend. By the 33 *E. 3. st. 1. c. 11.*, the ordinary shall depute the next and most lawful friends of the deceased to administer the *goods* of the deceased, and the 21 *H. 8. c. 5.* speaks of commission of the administration of the *goods* of an intestate. Upon these grounds it appears to me, that upon the vacancy of a presentative advowson, a right and interest independent of the advowson accrues to the patron, and that this is a chattel right and chattel interest.

It remains to be seen, whether there be any thing particular in this case to take it out of the ordinary rule of chattels. And one ground insisted upon is, that this right accrues to the prebendary in right of his prebend, and that it is commensurate with his continuance as prebendary, and that when he ceases to be prebendary the right is gone. But is there any authority to warrant this conclusion? I agree that the right accrues to him in right of his prebend, because he is prebendary; but when the right has accrued by the vacancy, I deny that it is dependent upon the prebend or to cease with it, but I insist that, like all the instances I have put in the early part of what I have been stating, it is independent of, and unconnected with the advowson, and a distinct independent chattel. The case put, *F. N. B. 34.*, of the parson who is made a bishop, is upon principle in point, but it is not the only case. *Co. Litt. 90 a.* and 388., in the case of a ward, is in point also. The objection is, that the chattel interest is acquired not in his personal, but in his corporate character. The parson in *F. N. B.* acquires his right, the very same species of right in the same way. In *Co. Litt. 90 a.* this case is put, "A tenant holds of a bishop by knight's service, the bishop has the
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seigniori in right of the bishopric, the tenant dies, his heir within age, the bishop either before or after seizure dies, neither the king nor successor shall have the wardship, but the executors. For albeit the bishop hath the seigniori en auter droit, yet the wardship being but a chattel, he hath *in his own right*, and a chattel cannot go in the succession of a sole corporation unless it be in the case of the king. The same point is put more shortly, *Co. Litt.* 388 a., "If a bishop hath a ward fallen and dieth, the king shall not have the ward, nor the successor, but the executor, and the ward shall be assets in his hands. So it is of a heriot, relief, or the like." Now this, as it seems to me, bears a strict analogy to the present case: the bishop there has a seigniori in right of his see; here, the prebendary has an advowson in right of his prebend; a chattel accrues from each; a wardship in the one case, a right of presentation in the other. The wardship goes to the bishop in his own right. Why shall not the right of presentation in the other? The former goes to the executor, why shall not the latter? The only difference between the two cases is, that the wardship is assets; the right of presentation is not, though the damages for an obstruction to it would be. But is this difference material? A right of presentation, though not assets, goes to the executor in ordinary cases. The only recognized exception is in the case of the king. The constituting assets, therefore, is not the criterion. But in the very case of bishoprics, there is a difference between the case of wardships and the case of a right of presentation; the former went to the executor, the latter to the king. Will this, therefore, furnish a ground upon which the defendant in error can stand in this case? Can he shew that

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that this is founded upon the nature of the right, viz. a right of presentation, and that it extends to all cases of such a right; or will it not appear that it extends to all cases of the king upon a tenure in capite, and that it is confined to the king and that peculiar species of tenure? The case I have already mentioned from *Fitzherbert*, viz. the case of the parson made bishop, shews that it is not founded upon the nature of the right, viz. the right of presentation; and the fact that it extends to cases of wardship, upon a tenure in capite in the king's case, shews that the peculiarity results from the peculiarity of tenure and the rights of the crown, and not from the nature of the right. The general rule is, that a chattel cannot pass by succession from predecessor to successor; *Co. Litt.* 9 a. 46 b. 90 a. But by custom it may; as in the case of *The Chamberlain of the City of London*, where, by the custom of the city, a bond to the chamberlain for orphanage-money will pass to the successor; *Fulwood's* case (a), *Byrd v. Wilford* (b); or it may be the terms and conditions of a tenure. And it is to this I attribute the peculiarity in the case of the bishops, upon which great stress was laid in the argument, rather than to the spiritual right in respect of which they hold their possessions. If, for instance, a living becomes vacant, of which a bishop, in right of his see, is patron, and the bishop dies, the right to fill up that living passes with the other temporal rights of the see to the crown. And though the crown restore the temporalities to the successor, without filling up the vacancy, the right to fill it up remains with the crown. But I do not find this to be the case with re-

(a) 4 Co. 64 b.

(b) Cro. Eliz. 464.

spect to advowsons in the patronage of any other corporations sole; and I find, that in the case of the crown there is a similar peculiarity in the case of every tenure in capite. If the king's tenant in capite hold an advowson as parcel of his advowson, and the church become void, and the tenant die without presenting, the right of presentation, if the heir be of full age, will be in the tenant's executors; but if the heir be within age, the right will be in the crown. Upon what, then, does this right in the crown depend? Clearly not upon the spiritual nature of the property, because it is a right of presentation; for if the heir were of full age he would have it, but upon this, that according to the terms and conditions of the tenure, if the land came to the crown for wardship or otherwise, whilst the church was void, the right of filling up the church should be not in the executors of the tenant, but of the crown. And in the same way in the case of a bishopric, the right of the crown may be founded upon this, that according to the terms and conditions of a tenancy of the bishop (for every bishop always held of the crown), whenever a bishopric became vacant, the right of filling up all vacant churches within the patronage of the see should be, not in the executors of the bishop, but in the crown. This, as it seems to me, accounts satisfactorily for the peculiarity of the case of bishops, puts them upon the same footing as other tenants in capite (*Co. Litt.* 70 b.), and makes the peculiarity of their case inapplicable to the present.

The only remaining argument against the plaintiff below (I believe) is founded upon the case of donatives. But when the distinction between donatives and presentative benefices

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benefices is considered, and attention is paid to the ground upon which *Repington v. Tamworth School* (a) was decided, the case of donatives, as it seems, will furnish no argument which can bear upon this case. In case of a presentative benefice there is a duty upon the patron to present. The public is considered as having an interest in there being a prompt and speedy presentment. A neglect is punished by lapse. This is, I apprehend, the foundation of the right the law creates when a vacancy occurs. The right is the consequence and off-spring of the duty. But in case of a donative, the law recognizes no such duty, and the miserable report of the case we have in *Wilson*, states as the ground of the decision, that in the case of a donative there is no lapse. I am aware that it was said arguendo in *Colt v. Glover* (b), that it had been agreed in *Gaire ats. Fairchild*, that the ordinary might sequester a donative if the patron would not present; and that according to the report in *Yelv. 61. Gandy, Fenner, Yelverton, and Williams* (against *Popham C. J.*), held, that the ordinary might compel the patron to collate some clerk; but this point was not necessary to be decided in that case, for the only points were, whether the incumbent could resign to his patron, and whether his resignation was good. I do not find this point mentioned in the contemporaneous reports, *Cro. Jac. 63. Moore, 765. or in Co. Litt. 344 a.* which contains the substance of this case. I have never heard of any instance of a proceeding in the spiritual court to compel the filling up a donative, and the case of *Repington v. Tamworth School* appears to me to have proceeded on the supposition, that there was no power

(a) 2 Wils. 150.

(b) 1 Roll. Rep. 453. Hil. 14 Jac.

to compel the patron of a donative to fill the church, and that the necessity, therefore, of raising a personal right detached from and independent of the advowson did not arise. Why should the question of lapse have been mentioned, except to shew this distinction between a common benefice and a donative, that in the latter it was optional in the patron to fill the church or not; and that the law, therefore, did not raise a chattel out of the inheritance, as in the case of a common benefice, because until the patron took the step to fill the church, it was not certain he would ever fill it, and until he chose to exercise his right, it would remain in the inheritance as part and parcel of the estate. Upon these grounds I am of opinion that the case of a donative is distinguishable from this case, and that we are not warranted by the case in *Wilson* to take this out of the ordinary case of presentative benefices. The point, that the prebendary is a *spiritual*, and not a *lay* corporation, I do not particularly notice, because it is clear the prebendary has no cure of souls, his functions are not of necessity spiritual, the filling up his church is not a *spiritual* function. Until the statute of 13 & 14 *Car. 2. c. 4.* he might have been a layman, and though spiritual persons have an advantage over laymen in knowing the merits and talents of the members of their own profession, it is to be presumed, that when laymen have the distribution of any church preferment, they will act conscientiously in bestowing it according to the best judgment they can form for themselves, or can obtain from the opinion of others. Upon the whole, therefore, I am of opinion, that in the case of a presentative benefice, as this is, a vacancy separates from the inheritance a right of presentation, that that right

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right is a chattel interest, that it vests in the prebendary, not in his corporate but in his individual capacity, and that there is nothing which will justify us in saying that it shall not take the direction and be subject to all the incidents of an ordinary chattel.

Whilst I was considering this case, I thought it proper to endeavour to get what light I could upon the position in *Co. Litt.* 90. and 388., that the bishop's ward would go to his executors, because that is one of the main grounds upon which my opinion rests, and had that position appeared erroneous my opinion might have been different. In my search I met with two cases, which I think right to mention, one in 40 *Ed.* 3. 14. and the other in 2 *H.* 4. 19. In the first the Bishop of *Lincoln* brought a writ of ward, and counted that the infant's ancestor held of him by knight's service. *Belknap* pleaded in abatement that the ancestor died in the lifetime of the preceding bishop. *Candish*, for the bishop, said, he might hold of us in our own right. *Belknap* thereupon pleaded that he held of the predecessor as in right of his church, and died in his time, and said that in such case the plaintiff should have supposed in his writ that the ancestor held of the preceding bishop, and he prayed judgment, not in bar, but of the writ. The plaintiff was driven to maintain his writ, and then he pleaded that he died after the preceding bishop. Sed per *Thorpe* C. J. he might have died whilst the temporalities were in the king's hands, and then the ward would belong to the king. You must plead that he died in your time: which was done, and issue was joined thereon. Upon this the reporter makes this note: "It seems to me by the opinion here of this book, that if a ward fall in the time of a bishop, and the bishop die, and the king present another bishop, the infant

Infant being within age, the king shall not have the ward, nor the executors of the former bishop, but the successor. But that if it fall whilst the temporalities are in the king's hands, the king shall have it. This certainly is the inference from the defendant's pleading the matter in abatement, and not in bar; for it assumes that it would have been a better writ had it stated that the tenant died in the preceding bishop's time. *Brooke* notices this case, *Gard.* pl. 9., and adds, quod nota et videtur, if he die in the life of the predecessor, the executor shall have it, and not the new bishop; and he refers to 2 *H.* 4. 16. and 11 *H.* 4. 80. (which I cannot find). I do not find this case in *Fitz.* In 2 *H.* 4. 19. the Bishop of *Lincoln* brought a writ of ravishment of ward, and it was said to have been held for clear law, that if a bishop's tenant die, his heir within age, and the bishop die without seizing the ward, the successor may seize him, and shall have a writ of ravishment of ward against any that takes him out of his possession, and some said, the successor might have a writ of ward. Quod quære. And it was laid down there, as it had been in 2 *H.* 4. 14., that upon ravishment of ward, it was not sufficient to impeach the plaintiff's title, defendant must shew a title to remove him, for possession is sufficient except against title. *Fitzh. Gard.* pl. 73. notices the position, that some said, "Successor might have a writ of ward;" and makes no comment or query. *Bro.* notices it also, *Gard.* 23., and *Ravishment de Gard.* 7., and in the former case inserts "Q.," and in the latter "quod quære;" but whether the query is to note his own doubt, or the query in the Year Book, may perhaps be inferred from his quod nota, &c. to the case of 40 *Ed.* 2., but not otherwise. The latest of these two cases is two centuries before the time when Lord *Coke* published his com-

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ment upon *Littleton*; and from the decisive manner in which he states the point, there can be little doubt, but that what was matter of doubt in the time of *Henry IV.* had become matter of legal certainty before the time of *James I.* The matter would be likely frequently to occur, and, therefore, was not likely to remain unsettled for two centuries.

I have not relied on the *Prebendary's* case, 24 *Ed. 3.* 26., because he might proceed for damages only, and not for a writ to the bishop. And yet his right to damages would be founded upon this, that the right of presentation was a chattel and part of his personal estate. Upon the whole, I am of opinion, that the plaintiff is entitled to our judgment, and has a right to a writ to the bishop.

Lord TENTERDEN C. J. This was a proceeding in a quare impedit brought by the administratrix of the late prebendary of the prebend or canonry of *South Grantham*, founded in the cathedral church of *Salisbury*, and to which prebend the advowson of the rectory of *Welby* is alleged to belong, claiming to be permitted to present a fit person to that rectory, being void. It appears by the pleadings that the rectory became void in the life of the late prebendary the intestate, and so continued until his death.

The question is, Whether the administratrix be entitled to present?

The Court of Common Pleas held that she was not entitled, and gave judgment for the defendants; upon which a writ of error has been brought, and the case has been argued before us with great ability and learning. It does not appear that such a question has ever been presented to a court of law before the present occasion, nor what practice has prevailed in such cases.

Some

Some points are settled by many decisions. If a person seised in his natural capacity of an advowson of a presentative benefice, either appendant or in gross, whether seised in fee or for life, dies after the avoidance of the benefice, the presentation for that turn belongs to the executor, and not to the heir or remainder-man.

So if a wife seised of an advowson dies after vacancy, the husband shall present, although she die without having had issue, and he does not become tenant of the advowson by the curtesy. For this the 21 *H. 6.* 26 *b.* has been quoted.

It is clear, also, that if the next presentation be granted, either by a natural or politic person before avoidance, this is considered in law as the grant of a chattel, and the turn shall go to the executor, and not to the heir of the grantee, even though the grant be made in words to the grantee and his heirs. In this case the thing granted must necessarily be a chattel, is not for the life of any one or more, nor does it convey an interest in fee or tail, for those are perpetual, and this only temporary.

In the case of a presentative benefice and a natural person, the void turn in the hands of the owner of the advowson is also called a chattel, and on that account said to pass to the executor. In the time of Queen *Elizabeth* a question arose whether it should pass by a grant of *bona et catalla utlagatorum* made by King *Edward* the Fourth. The Court of Common Pleas, in which the case arose, was not unanimous on the question. It does not appear that any judgment was given. Another point arose, upon which, it should seem, that judgment might have been given for the Queen, without deciding this point. The case will be found in

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Owen, 155. and 1 *Leon*. 201. and 4 *Leon*. 107. *Periam J.* is reported to have said that "the presentation was a chattel, for if the patron dieth, the executor shall present, for it was a chattel vested in the testator." *Anderson C. J.* appears to have thought otherwise; he says, "A man cannot be said to have a chattel, but where he is possessed of it, and here this interest is but *jus presentandi*."

In the case of a donative whereof a natural person dies seised, a contrary rule has been laid down, and it has been decided that the executor is not entitled, 2 *Wils*. 150.

I have not, however, found any sufficient reason for a distinction. The reasons of the judgment do not appear in the report. It may have been that the Court thought the rule as to presentative benefices not well founded, and, therefore, not to be extended. A donative, however, is of so peculiar a nature that it does not seem to furnish any argument of general weight.

There is one instance mentioned in the books, which I must own I cannot but consider as an exception to the rule even in the case of a presentative benefice and a natural person.

If the king's tenant by knight service in capite died after vacancy, his heir within age, the king presented. It is said that this was a prerogative right, and that, therefore, no argument can be drawn from it. The king certainly may take a chattel by virtue of his prerogative, but there is no reason for his doing so when there exists another person capable of taking. And if the void turn had been severed from the advowson, and become a chattel, the prerogative right of wardship could not attach upon it, for that could only attach upon what descended

descended to the ward. If the heir were of full age, there is no authority for saying that the nature of the tenure would prevent the executor from presenting as in the case of tenure in socage. If the void turn were not considered as severed from the inheritance, but still remaining parcel of it, the king's right to present would be clear, and the right having once vested in the crown would remain in the crown by virtue of the prerogative, notwithstanding the heir attaining his age; and this upon the general rule, that a matter once vested in the crown cannot pass but by special grant of record. If the case of the tenant in capite be considered as an exception to the general rule, that case, as well as the case of a donative, will shew, that even where a natural person is seised of the advowson, the right of the executor is not universally acknowledged. But the question now before the Court does not arise on the case of a natural person. The intestate was seised of the advowson in his politic, and not in his natural capacity. If he had presented he would have presented not in his personal right, but in right of his prebend. And the question, therefore, is, Whether the rule admitted to prevail generally in the case of natural persons, and so far as regards a presentative benefice, with one exception only, if there be one, is to be extended to a person seised in a politic capacity? and I must say, I think it is not. I have not found any reason satisfactory to my own mind for considering the void turn as a chattel, on a question between the heir and executor of a natural person. The turn is not assets; nothing can be made of it for the payment of debts; and, therefore, the rule cannot be founded upon any consideration of that kind. I do not think the want of a satisfactory

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reason to be a sufficient ground for overturning a rule grounded upon the authority of decisions, and of a practice long continued. But when, as at present, a question arises, whether such a rule shall be applied to a new case, I think the want of such a reason authorizes me to say that it ought not to be so applied, if any distinction between the cases can be discovered. It is true, that a successor in a sole corporation cannot, according to general rules, take a chattel by succession; but it is also true, that a sole corporation cannot in that character take a chattel; and though granted to the corporator and his successors, it will vest in him, not in his politic or corporate, but in his natural capacity; *Arundel's case* (a). And if a sole corporation cannot take a chattel by grant, how happens it that the void turn shall become a chattel vested in the corporator? Can vacancy so far change the nature of the thing as to vest that right in him in his natural capacity, which before vacancy he had in his politic capacity? The only authority that I have met with in support of such a doctrine is in *Fitzherbert, N. B. 34 N.* It is there said, "If a vicarage happen void, and before the parson presents he is made a bishop, yet he shall present to this vicarage, because it was a chattel vested in him." This proposition is not supported by a reference to any decision, and rests, therefore, upon the authority of *Fitzherbert*, which is certainly entitled to great respect. But if the opinion of that learned judge was grounded only upon the prevalent notion that a void turn was a chattel, and this can be shewn inapplicable to the case of a politic person, it will lose its weight. Standing alone as it does, I cannot think it suf-

(a) *Hob. 64.*

ficient to bind the judgment of the Court. In the case itself, however, there is no necessary change in the nature of the right; the presentment would be made by a person in whom the right had at one time vested. The same events might happen on the translation of a bishop, but I have not found by whom the presentation has been made under those circumstances. The presentation of the crown on the death of a bishop appears to me, for the reason that I shall mention hereafter, to be inconsistent with this opinion of *Fitzherbert*. And if this opinion of *Fitzherbert* be law, a presentation by the prebendary himself, will not be made in his politic, but in his natural capacity; not in right of his prebend, but in his personal right, and he might make his presentation in the same form as a natural person, and without naming himself prebendary, which I apprehend to be contrary to all practice, as it certainly is contrary to the last presentment to this very benefice, of which a copy is quoted at length by the Lord Chief Justice.

It is clear that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore, she be allowed to present, she must present in a right different from that in which the intestate would have presented, and this will not be conformable to the general rights of an administrator, which are those only that belonged to the person or personal property of the intestate. She is the administratrix of the personal rights and property of the intestate, but I find no authority for saying that she is the administratrix of his politic rights or property also.

It is not necessary in the present case to decide in whom the right is. It is sufficient for the purpose of this judgment to say that it is not in the plaintiff. My

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opinion would, however, have been less satisfactory to my own mind, if I had not been able, also, to form an opinion as to the person entitled to present. Whether, with that addition, it will be satisfactory to others it is not for me to say. In my opinion the right is in the successor. But, if the nature of it be such as that, according to any rule of law, it cannot pass to the successor, yet it will not necessarily follow that it should pass to the executor; it may devolve upon the crown for want of title in any other person.

If the right be considered as parcel of the inheritance, it will pass with the inheritance to the successor. The only ground for saying that the right shall not pass to the successor, is that it has been severed from the inheritance, and is become a chattel. I have already intimated that I have found no satisfactory reason for preferring the executor to the heir, even of a natural person. The case in *Dyer* 283 a. has been often quoted on this point. The case was this: A patron granted the first and next presentation and advowson of a church, and the right of presenting to the same then being vacant, so that the grantee might nominate and present a fit person for that one turn only. Neither party presented within the six months, and the ordinary collated by lapse. The church became void again. Both parties presented: the clerk of the grantor was admitted. The grantee brought a quare impedit, and judgment was given against him. Six judges appear to have held that the grant of the present avoidance was void; "for," says the reporter, who was one of the six, "it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right, power, and authority; and also a chose in action, and in effect, the fruit and execution

execution of the advowson, and not any advowson. And yet the executors shall have it by privitie of law." It is to be observed, that this was the case of a natural person. The expression "a mere personal thing," is suited to such a case; the phrase *a mere prebendal thing* would not be less suited to the case of a prebendary: the words "a thing in right, power, and authority," may be applied to a prebendary, a prebendal right, power, and authority; the words "the fruit and execution of the advowson, and not the advowson," are applicable to either case. The only phrase that leads to the exclusion of the heir or successor is the expression "a chose in action;" and this is altogether unnecessary to the judgment, which may be well supported upon the other expressions used by the reporter. In the present times, I apprehend, such a question would be decided upon a more solid and less technical and subtle ground, namely, the prevention of simony.

If in the case before the Court it be held that the administratrix is entitled to present, it cannot be denied that a right generally annexed to a prebend will in the particular instance be exercised not merely by a person who has not the prebend, but by a person claiming as if he from whom the title is derived, and who had the advowson in his politic capacity, had, in fact, held it in his natural capacity. A decision to this effect will be contrary to the nature of the right. A decision against the administratrix will be contrary to the general rule by which a void turn is considered as a chattel in the case of a natural person. A choice must be made between these two difficulties. In my opinion the principles of law will be less violated by holding that the void turn is not a chattel in this case of a corporation

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sole, and thereby giving the presentation to the successor, who will present in right of the prebend to which the advowson belongs, than by holding it to be a chattel, and thereby severing the presentation for this turn from the prebend.

If it be said that such a severance takes place under a grant of the next presentation, which before the restraining statutes would have been good against the successor of a prebendary or bishop, and may still be good against the grantor himself (as in the case of the archbishops' options, which take effect under grants of the next avoidance made by the bishops of the province), and that in these cases the right is exercised by a person in whom the politic character to which the right belonged, is not vested, I answer, that in those cases the right of the grantee is derived from the politic character of the grantor, who is capable of making the grant, and does, in fact, make it in his corporate capacity. Whereas an administrator can derive nothing from the politic character of the intestate, not being the representative of that character, but of the person only. And although a right to present on the next avoidance may be made a chattel by the act of a party, it does not follow that it shall become a chattel by operation of law. I am not aware that in any case the nature of a right is changed by the mere operation of the law working by itself without any act of the party. In the case of a natural person the nature of the right is not changed by giving the presentation to the executor. It is only a preference of one representative to another, the heir as well as the executor being a representative of the deceased. It may be asked, How, then, does the executor become entitled to rent due in the life of the prebendary?

I think

I think there is a manifest distinction between a rent and a presentation. The rent is intended for the maintenance of the prebendary; it can be enjoyed and used in his personal capacity only, and not in his politic capacity. It is assets in the hands of his executor, and nothing remains to be done to give or to accompany the present right to receive it; whereas a presentation is an act to be done, and must be accompanied by a right to do it.

Thus far I have treated the question on principle only, and as if the law furnished no decision or authority in favour of my opinion. But the case of a bishop dying after avoidance, and before presentation, does, as I think, furnish an authority. In that event the king is entitled to the presentation, *Co. Litt.* 388 *a.*, as he is if the benefice become void during the vacancy of the see. This is, however, said to be by virtue of the prerogative; and so in one sense it is, but the matter is open to observations similar to those which I have already made on the case of the tenant in capite. It seems agreed that the king's right is by reason of the temporalities vested in him. A ward, relief, heriot, &c. passed to the executor, and were assets in his hands. All of these, however, were considered in law as chattels from the beginning, and came to the bishop as chattels. Guardian in chivalry may grant, by deed or without deed, the wardship of the lands, or of the heir, or both, to another, *Lit. s.* 116. The reason for the power of assigning without deed given by Lord *Coke*, is, that the wardship is an original chattel during the minority, derived out of no freehold. *Co. Lit.* 85 *a.* If the turn had become a chattel, it must have ceased to be parcel of the temporalities, and must have vested in the bishop in his personal or
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natural character, and so have passed to his executors, as the void turn in the present case is alleged to do. The inference to my mind, therefore, is, that the void turn in that case of a corporation sole has not been considered as a chattel, but as still remaining parcel of the inheritance and of the temporalities, and being thus vested in the crown, the prerogative right would attach upon it in full force, and it would remain in the crown notwithstanding restitution of the temporalities to the successor, such restitution not being accompanied with a special grant of the particular presentation. In *Co. Litt.* 388 *a*, the reason given against the right of the executor of the bishop is, that nothing can be made of the presentment. It is obvious that this reason will apply with equal force to the executor of a natural person, and it seems, therefore, that this reason cannot have been the foundation of the rule, nor can I think that the rule is founded upon any other reason, except that of the presentation remaining and passing as part of the temporalities.

I have hitherto purposely abstained from offering any argument from the presumed intention of the founder of the prebend. We are not judicially informed of the foundation of this particular prebend. Speaking of prebends generally, I believe their foundations to be various, some by the diocesan, some by the crown, and some by private persons. But whoever may have been the founder, I conceive the object of the foundation to have been the maintenance of the prebendary, and that where an advowson formed part of the foundation, it was, at least, thought probable by the founder that the prebendary might become the incumbent, and so derive his maintenance from the benefice, if it was not absolutely intended

intended that he should do so. This opinion or intention of the founder will be best carried into effect by holding the void turn to be parcel of the inheritance, and so to pass to the successor, because the successor will be thereby enabled to present himself, which he cannot do if the turn passes to the executor of his predecessor. And if the annexation of the advowson to the prebend be considered as a trust intended to be vested in the prebendary, and to be executed only by the prebendary, this intention will certainly be defeated by allowing an executor to present. It is true, that before the statute 13 & 14 *Car. 2.*, a prebendary might have been a layman, and incapable of holding the benefice; but this was certainly contrary to general practice, and I apprehend, also, contrary to the general policy of the law. And although this fact may diminish the weight of observations derived from the ecclesiastical character of a prebendary, yet it does not affect his corporate character nor the nature of the supposed trust. My judgment is grounded upon that character, and it is upon consideration of the nature of the right, as vested in the politic and not in the natural person, and upon the want of any sufficient reason for the rule that has prevailed, and must still prevail, unless altered by an authority superior to that of this court in the case of natural persons, that, I think, that rule ought not to be applied to the case of a corporation sole, and that the void turn must be considered as parcel of the inheritance passing to the successor, and not as a chattel severed from it and passing to the personal representative of the prebendary.

Judgment reversed.

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BROWNING and Another *against* AYLWIN and Another.

In an action against a sworn broker of the city of *London* for negligence in making a contract, the Court will, on motion, compel him him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract.

IN *November* 1826 the plaintiffs employed the defendants, who were sworn brokers of the city of *London*, to purchase for them thirty-nine casks of fine olive oil, then the property of one *Barto Valle*. The defendants delivered to the plaintiffs a bought note, purporting that defendants bought for plaintiffs' account the oil in question. *Barto Valle* refused to deliver it, alleging that he was not bound by any contract so to do. In fact, the sold note delivered by the defendants to *Barto Valle*, differed from the bought note delivered to the plaintiffs. The latter, therefore, could not enforce the contract, and they brought the present action against the defendants, to recover damages for the loss which they had sustained in consequence of their being unable to enforce the contract. The sold note delivered to *Barto Valle* had been returned by him to them. It is a part of the condition of the bond entered into by the defendants with the corporation of the city of *London*, on their becoming brokers, that they shall enter in a book to be kept for that purpose, all contracts made by them; and that either of the parties to such contracts, whether buyer or seller, shall be at liberty to inspect the original entries of such contracts. The plaintiffs had applied to the defendants for liberty to inspect their books, which was refused. *Parke* had obtained a rule nisi, calling upon the defendants to produce their books, in order that the plaintiffs might inspect and take a
copy

copy of the original contract entered in the defendants' books.

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F. Pollock now shewed cause, and contended that the Court ought not in an action against a party for negligence, to compel him to produce his private books, as evidence against himself.

Parke contra, contended, that where an instrument was in the hands of an opposite party, as a trustee, the Court would compel him to produce that instrument; and that here the broker was a public officer, and had entered into a bond with the city of *London* to make entries in his books of all contracts, and to allow the parties to inspect the same. He cited *King v. King (a)*, *Morrow v. Saunders (b)*, and *Tidd's Practice*, 623. The entry of a contract in the broker's book, signed by him, is the best evidence of the contract. *Goom v. Affalo (c)* only shews that where there is no such entry signed by the broker, the bought and sold notes are sufficient.

BAYLEY J. We think the broker is the agent of the parties, and in the nature of a public agent, and, therefore, that the parties are entitled to the inspection of the documents.

Rule absolute.

(a) 4 *Taunt.* 666.

(b) 1 *Brod. & B.* 318.

(c) 6 *B. & C.* 117.

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MEMORANDUM.

In this term *Thomas Andrews, Henry Storks, Edward Lawes, Edward Ludlow, Henry Alworth Merewether, William Oldnall Russell, David Francis Jones, John Scriven, Henry John Stephen, and Charles Carpenter Bompas*, were called to the degree of the Coif, and gave rings with the following mottos: the first seven, "More majorum;" and the last three, "Lex ratione probatur."

W. MORRANT and ANN his Wife *against* GOUGH, Devisee, and T. SANDY, as Heir, of certain Lands, &c. of THOMAS SANDY, deceased. (a)

Where a party, who by writing obligatory (without any penal sum), had bound himself to pay to *A. B.* an annuity of 20*l.* a year for her life, devised his estates upon certain trusts,

DEBT on bond, made by *T. Sandy*, whereby he bound himself unto the plaintiff *Ann*, "in the sum of 20*l.*, to be paid yearly during her natural life (at the decease of the said *Ann* to return to the heir of *T. Sandy*.) The declaration averred, that on the 20th of *March* 1797, *T. Sandy* died; that after his death, viz. on the 5th of *September* 1824, 50*l.* for two years and a half

until his son should attain the age of twenty-one years: Held, that the estate of the trustees ceased upon the death of the son under the age of twenty-one, all the purposes of the trust being then at an end; and that the trustees were only liable to pay to *A. B.* such arrears of the annuity as became due before the son's death.

(a) The Judges of this court sat, as on former occasions, from *Thursday* the 5th day of *July* to *Wednesday* the 11th day of *July* inclusive, and again from *Monday* the 29th day of *October* to *Monday* the 5th day of *November* inclusive. During that period, this and the following cases were argued and determined.

of

of the said yearly payment or sum of 20*l.*, became and was still due and in arrear to the plaintiffs," &c.

The defendant, *Gough*, pleaded (amongst other things), thirdly, that *T. Sandy* on, &c. made his will, whereby he bequeathed to *Mary Sandy*, his wife, the sum of 20*l.* yearly, during her natural life, to be paid her by his executors, from such of his estates as were thereby devised to them in trust; and he appointed the defendant and *C. Sandy* his executors and trustees, and gave and devised to them all his freehold and leasehold messuages, tenements, and lands, &c., and also all his bonds, notes, and securities for monies, in trust for his son, *T. Sandy*; and that they, defendant and *C. Sandy*, should receive the rents, profits, and interests thereof, and apply the same for the purpose of maintaining and educating his son, *T. Sandy*, until he should attain the age of twenty-one years; and the testator did thereby authorize, empower, and direct his said executors, from and after his decease, and until his son should attain the age of twenty-one years, to manage and improve the estate and fortune of his said child, according to their discretion; and that they should pay unto and account with his said son for such rents, interest, produce, and improvements as should arise from or be made or produced from such estates and monies, when he should attain the age of twenty-one years; and if *Mary Sandy*, testator's wife, should be living when the son attained that age, then the executors and trustees should retain and hold in trust as much of the testator's estates as would secure to his said wife the 20*l.* a year. Averment, that testator's wife died on the 13th of *July* 1794, before the testator, and that he died on the 20th of *March* 1797, without revoking or altering his will; that the son

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was then living, and afterwards, on, &c. and before the exhibiting of the plaintiff's bill, died under the age of twenty-one years; "whereupon all the estate, interest, right, and title of the said *C. Sandy* and defendant in and to the said premises in the will mentioned, the same being all the lands, tenements, and hereditaments whereof the said testator was seised at the time of his death, utterly ceased and determined." And before the exhibiting of the bill of the plaintiffs, to wit, on, &c., all the monies which at any time during the lifetime of the said *T. Sandy*, the son, became due and payable, for and in respect of the yearly sum of 20*l.*, in the bond mentioned, was paid and satisfied to the plaintiffs. Replication, that before the commencement of this action and after the death of *T. Sandy*, the testator, and during the life of *T. Sandy*, the son, to wit, on, &c. defendant had notice of the bond having been made as aforesaid, and being then outstanding in the hands of the plaintiffs; and that the rents, issues, and profits of the said lands, tenements, and hereditaments so devised to the defendant as aforesaid, arising and issuing thereout, for and during the time which elapsed between the death of the testator and the death of *T. Sandy*, his son, did amount to much more than sufficient to pay and satisfy to the plaintiffs all the monies which at any time during the life-time of the said *T. Sandy*, the son, became due and payable for and in respect of the said yearly sum of 20*l.* in the bond mentioned, and wherewith the said debt in the declaration mentioned, and the damages could, might, and ought to have been satisfied. Demurrer and joinder.

Carter

Carter in support of the demutrer. The defendant is charged as devisee of the real estate of the testator, but the plea shews that he neither has it now, nor had it at the time when the demand accrued. The devisees in trust took only a chattel interest. The son took, by implication, a vested remainder in fee, and upon his death the estate of the trustees ceased, *Goodtitle v. Whitby* (a), *Tomkins v. Tomkins*, there cited by Lord Mansfield, *Lomax v. Holmeden* (b), *Mansfield v. Dugard* (c), *Goodright v. Parker* (d). If the trustees received during the son's life more than sufficient to discharge all demands that accrued before his death, they are bound to account for the surplus to the personal representative of the son, and cannot apply it to the discharge of any demand which became due at a time subsequent to his death.

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Manning contra. The devisees in trust took an estate in fee. They were directed to apply the rents and profits in a certain mode during the minority of the testator's son, and on his attaining full age, they were to retain so much as would suffice to pay the annuity devised to the testator's wife. [*Bayley* J. That devise lapsed. *Holroyd* J. If she had survived her husband would the estate of the trustees have extended beyond her life?] They were to exercise their own discretion as to what should be retained. But, secondly, supposing they had an estate only co-extensive with the life of the son, still the whole profits received are liable to the payment of this debt by force of the statute

(a) 1 Burr. 228.

(b) 3 P. Wms. 176.

(c) 1 Eq. Ca. Ab. 195.

(d) 1 M. & S. 692.

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3. & 4 *W. & M. c. 14.*, which enacts that all devises shall be deemed fraudulent as against specialty creditors. Now if the estate had been devised in fee to the defendant, the plaintiff would at any time have had a right to recover the annuity out of the rents and profits whenever received, and the testator had no power to place the creditor in a worse situation by devising particular interests. [*Littledale J.* Upon these pleadings would the devisee be liable personally, or would the execution be against the land?] The heir and devisee are liable in the debt, and, therefore, they must be personally liable. [*Littledale J.* Not unless they plead a false plea, and if the execution is against the land, that cannot affect the present defendant, who has nothing to do with it.]

Carter in reply. This is not an ordinary debt coming within the provisions of the 3 & 4 *W. & M. c. 14.* There is no debt which was due from the testator, the bond was not made with a penalty which could, on a forfeiture, become a debt in law; each annual payment when it becomes due, constitutes the only debt, and when that has been paid, there is no debt until the next day of payment arrives.

BAYLEY J. It appears to me that the plea in this case is good, and that the replication does not give a sufficient answer. The bond in question is not an ordinary money bond, but an instrument whereby the testator bound his heirs, &c., to pay the plaintiff *Ann* 20*l.* per annum for her life. By a devise in fee, the devisee becomes the hæres factus for ever, and would therefore be liable to pay the annuity as long as it endured

endured ; but if the devise be for a shorter period, then the devisee is only liable during the period for which he is made the heir, and when he ceases to have the estate it descends to some other person, and the obligation passes along with it to that person. Had, then, the present defendant an estate in fee? It appears by the will as stated in the plea, that the trustees had certain duties to discharge until the son should attain the age of twenty-one years ; but after that period there was nothing to be done by them, and it is a general rule that a devise to trustees ceases as soon as the purposes of the trust are at an end. The provision for the annuity to the wife, if she should be living when the son attained twenty-one, was conditional, and as she died before the testator, the whole burthen that attached upon the estate during the son's life had been discharged when that event happened, and the estate, consequently, would, before the commencement of this action, go to the person next entitled. Inasmuch, then, as the present claim did not attach upon the estate while it was in the hands of the devisee, the action against him cannot be maintained.

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HOLROYD J. It is perfectly clear that the trustees took an estate only until the son died. As to the other point, this is not the case of a bond with a penalty which could be forfeited, and so become a debt in law ; and, therefore, the person to whom the land was given, was only bound to pay the annuity during the period for which he had the land.

LITLEDALÉ J. I am entirely of the same opinion. Here the trustee took a particular interest only, and is not liable for any thing which accrued due after that

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interest expired. Had the bond been made with a penalty and became due in the lifetime of the testator, or during the existence of the interest devised to the trustee, he might have been liable to pay the whole; but this bond is for a sum of 20*l.* accruing due year by year, and the devisee could only be bound to pay what accrued due in the time of the testator, or during his own interest. The statute 3 & 4 *W. & M. c. 14.* says, that devises shall be deemed fraudulent against creditors of the testator. The plaintiffs were not creditors in the time of the testator, and they have received all that for which they became creditors in the time of the devisee. That statute, therefore, does not affect the question, and as the defendant no longer has the land, he cannot be charged in this action.

Judgment for the defendant. (a)

(a) On the subject of fraudulent devises, see 2 *Wms. Sound.* 7. n. 4.

HOLDERNESS and Another, Assignees of FOXTON, a Bankrupt, *against* W. and J. COLLINSON.

A wharfinger at *Hull* claimed a general lien for wharfage, labourage (comprising landing, weighing, and delivery), and warehouse rent. The claim for wharfage was admitted; but as to the resi-

TROVER for flax and other goods of the bankrupt.

Plea, not guilty. At the trial before *Bayley J.* at the last *Lent* assizes for *York*, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case. The defendants are wharfingers and owners of a wharf and warehouse at *Hull*. *Foxton* the bankrupt was a merchant at *Hull*, and previous to

due, upon a case, stating that in *Hull* such claim had, in a great majority of instances, been acquiesced in, but in others, had been rejected, and that the right had long been, and still was, a disputed point there: Held, that the claim could not be supported, as the right of general lien arises out of an express or implied contract, of which the former had not been made, and the latter could not be inferred from the circumstances stated in the case.

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his bankruptcy, from time to time landed goods at the defendants' wharf, and placed them in their warehouse, part of which were delivered by the defendants to the bankrupt before his bankruptcy. At the time of *Foxton's* bankruptcy there were lying in the defendants' warehouse above 9 tons of flax, 848 bags, and 20 bundles of mats, the property of *Foxton*. The flax was the remainder of a larger parcel of $17\frac{1}{4}$ tons, which had been landed at the defendants' wharf, placed for some time in their warehouse, and in part delivered to *Foxton* previous to his bankruptcy. At the time of the bankruptcy there was due to the defendants by *Foxton*, the sum of 72*l.* 14*s.* 2*d.*, which included not only the charges due for the wharfage, labourage (which comprises landing, weighing, and delivery), and rent of the entire $17\frac{1}{4}$ tons of flax, and the bags and mats; but also charges of the same nature, due to them in respect of other goods which had been delivered to *Foxton* before his bankruptcy. After that event, and before the commencement of this action, the plaintiffs tendered to the defendants the sum of 41*l.* 10*s.* 3*d.*, which included the entire amount of all the charges due to the defendants for wharfage generally; and also all charges of every kind (including wharfage, labourage, and rent), up to the time of the tender, due to them in respect of the entire $17\frac{1}{4}$ tons of flax, and the bags and mats, and demanded of the defendants the delivery of the flax and bags, and mats in their possession. This the defendants refused, claiming a general lien on the said goods for wharfage, labourage, and rent; whilst the plaintiffs insisted that their general lien extended to wharfage charges alone, and not to labourage or rent; and it was agreed by both parties, that it should be taken as

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Court will, from the great preponderance of instances in which it has been acquiesced in, infer that the parties in this case contracted to have a general lien. But it will suffice to defeat the plaintiffs' action if the defendant be entitled to a lien for labourage; it is not necessary to contend for the more extensive claim of warehouse rent, as to which, however, there was a difference of opinion amongst the learned Barons of the Exchequer in *Rex v. Humphery (a)*.

BAYLEY J. The onus of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. Where the usage is general, and prevails to such an extent that a party contracting with a wharfinger must be supposed conversant of it, then he will be bound by the terms of that usage. But then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for anything beyond the mere wharfage. An attempt has been made to draw a distinction between the claim for labourage and that for warehouse rent, but the right to either arises out of an express or implied contract, and the case states that the claim to both those items is a point in dispute at *Hull*. In the face of such a statement, it is impossible to infer that the bankrupt landed his goods at the defendants' wharf upon the terms of giving a general lien in respect of those demands, and waiving

(a) 1 *McLeland & Young*, 173.

the dispute. Many of the instances of acquiescence may have proceeded upon the smallness of the demand, a desire to avoid litigation, or to have immediate possession of the goods, and this greatly diminishes the effect of them. For these reasons I think that the plaintiffs are entitled to recover.

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HOLROYD and LITLEDALE Js. concurred.

Postea to the plaintiffs.

R. JONES against FLEEMING and J. JONES.

ASSUMPSIT for work and labour. Plea, by *Fleeming*, non-assumpsit, and notice of set-off for money paid, had, and received, &c. ; by *J. Jones*, non-assumpsit. At the trial before *Burrough J.* at the last Spring assizes for *Cornwall*, it appeared that the defendants were co-proprietors and adventurers in the *Friendly* and *St. Agnes* mines, in *Cornwall*. In June 1824, the plaintiff entered into their employ, at a yearly salary of 80*L.*, as store-keeper of the *St. Agnes* mine, and as such was in the habit of drawing bills upon *J. Jones* and Son for the use of the mine, which were discounted by *Magor, Turner* and Co., bankers at *Truro*. On the 17th of September 1824, the defendants wrote and sent the following letter to that firm: "Agreeably to your request, we guarantee that such bills as may hereafter be drawn for the *Friendly* and the *St. Agnes* consolidated mines by Mr. *Richard Jones* shall be regularly retired, and he will produce to

A. was employed as store-keeper by *B.* and *C.*, who were joint adventurers in a mine, and he was authorized to draw bills on *B.* for money laid out on account of the mining company. The bills were discounted by a banker, and the payment of them was guaranteed to him by *B.* and *C.* *B.* having been arrested, *A.*, in order to provide funds to procure *B.*'s discharge, drew on *B.* a bill purporting to be on account of the mining company. The

banker discounted the bill, and paid the amount to *B.* *C.* was afterwards compelled to take up the same in consequence of his guaranty. In an action brought by *A.* against *B.* and *C.* for his salary, it was held that *C.* could not set off the amount of the bill,

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you at the time a letter specifying the amount required.” At the end of *September* 1824, *J. Jones* having been arrested in *Cornwall*, the plaintiff (his brother) drew and delivered to *J. Jones* the following bill, directed to *J. Jones* and Son: “Two months after date pay to my order the sum of 120*l.* for value received on account of *Friendly* mines.” *J. Jones* accepted the bill in the name of the firm, and sent it to *Magor, Turner* and Co., who discounted it, and he paid the money to the sheriff’s officer, and procured his discharge. *R. Jones* when he drew the bill knew to what purpose the money was to be applied. The bill having been dishonoured, *Fleeming* was called upon and paid it, under his guaranty, out of his own funds; and having discovered the nature of the transaction, in *December* 1824 dismissed the plaintiff from his employment. The plaintiff claimed a year’s salary, for which this action was commenced. The learned Judge thought that the defendant *Fleeming* had a right to set off the amount of the bill for 120*l.* which the plaintiff had drawn for the purpose of paying the private debt of *J. Jones*, and directed a nonsuit. In *Easter* term a rule nisi for a new trial was obtained, and now

Carter shewed cause, and contended that as the money produced by the bill for 120*l.* was not applied to the use of the mines, and the plaintiff *R. Jones* was consulant of and a party to the misapplication of it, he was responsible for the amount, which must be considered as paid to his use, or as received by him to the use of the defendants, his employers. [*Bayley J.* How can *J. Jones* insist upon a right of set-off, on the ground that money has been misapplied, when he concurred in the payment?] When the set-off is relied on by the defendant *Fleeming*,

Fleeming, an innocent party, the plaintiff ought not to be allowed to set up his own fraud as an answer.

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Halcomb, contra, was stopped by the Court.

BAYLEY J. I think that there must be a new trial in this case. It appears that an order was made by the plaintiff upon the partnership, but *Fleeming* alone paid that draft, when at maturity, out of his own funds. *Fleeming* and *J. Jones* have never jointly paid any money to the use of the plaintiff, and the payment by one cannot be set off in this action. Besides, it appears that the money produced by the bill was not in fact paid to the plaintiff, but to *J. Jones*. It, therefore, seems to me that the nonsuit was wrong, although the plaintiff by his share in the transaction may have subjected himself to a special action on the case.

Rule absolute.

BISHOP and Another against PENTLAND.

See Will. v. Agnew 3 B. & A.

Edman v. Wilson 16 M. & W. 476

ASSUMPSIT on a policy of insurance on goods warranted free from average, unless general, or the ship should be stranded. The defendant paid into court 49*l.* 11*s.* 11*d.*, the amount of the general average on the goods. The plaintiffs claimed particular average

A ship having goods on board which were insured, but warranted free from average, unless general, or the ship should be stranded, was

compelled in the course of her voyage to put into a tide-harbour, and was there moored alongside a quay, in the usual place for ships of her burden. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over upon the tide leaving her. The rope with which she was so fastened, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured: Held, that this was a stranding within the meaning of that word in the policy, and that the underwriters were liable for a partial loss, although the stranding might have been occasioned remotely by the negligence of the crew in not providing a rope of sufficient strength to fasten the vessel to the shore.

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and a partial loss. At the trial before *Hullock*, Baron, at the last Spring assizes for *Lancaster*, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case :

On the 21st of *November* 1824, the ship on which the goods were loaded was, whilst proceeding on her voyage, necessarily obliged to go into the harbour of *Peel*, in the *Isle of Man*, which is a tide harbour, and dry every tide. She was brought in by some fishermen belonging to *Peel*, who had gone out to her assistance, and under whose directions she was moored alongside the quay where ships of her burthen and build coming into the harbour of *Peel* usually are moored, and in as safe a situation as could be found. The ship was very sharp built, which rendered it necessary in addition to the usual moorings, to lash her, by a tackle fastened to the mast, to posts upon the pier, to prevent her falling over upon the tide leaving her. For this purpose, *J. Sayle*, one of the fishermen, and acting as pilot, asked the mate of the vessel for a rope, who gave him one, and which rope one of the witnesses stated that the mate informed him was a new rope, though the witness did not see it. The fisherman objected to it, stating that it was insufficient for the purpose intended; to which objection the mate replied, "that it was sufficient to drag the mast out;" and the rope was thereupon made use of in lashing the vessel to the pier. The state of the harbour where the vessel lay would have had no effect upon her if she had been properly lashed; and she would have sustained no damage in the harbour if the rope and lashing had not given way, and which rope was used contrary to the opinion of *J. Sayle*, the fisherman. On the morning of the 23d *November*, when the tide was
out,

out, the tackle by which the ship was lashed to the posts broke, and the ship fell over upon her side, by which she was stove in, and greatly injured. But for the breaking of the tackle, the ship would have remained in the same situation that ships usually are in *Peel Harbour* during ebb, and no accident would have occurred.

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F. Pollock for the plaintiff. The ship was stranded within the meaning of that word in the policy; and if so, the underwriters are liable, although the stranding may have been caused by the negligence of the crew. *Busk v. The Royal Exchange Assurance Company (a)*, and *Walker v. Maitland (b)*, are authorities to shew that the underwriters on a policy of insurance are liable for a loss arising immediately from a peril insured against, but remotely from the negligence of the master and mariners. Then, if the property insured in this case was damaged by a peril insured against, viz. from coming in contact with the salt water, although that may have been remotely occasioned by the negligence of the crew, the underwriters are liable. *Carruthers v. Sydebotham (c)* is expressly in point. There a pilot having charge of a ship, negligently^u run her aground, and that was held to be a loss by stranding. So in *Barrow v. Bell (d)*, where in the course of the voyage the ship was by tempestuous weather forced to take shelter in a harbour, and, in entering it, struck upon an anchor, and being brought to her moorings, was found leaky and in danger of sinking, and on that account was hauled with warps

(a) 2 B. & A. 73.

(b) 5 B. & A. 171.

(c) 4 M. & S. 77.

(d) 4 B. & C. 736.

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higher up the harbour, where she took the ground, and remained fast there for half an hour, it was held that this was a stranding within the meaning of the policy.

Kaye contra. There was not any stranding within the meaning of the policy, and if there was, it was occasioned by the negligence of the crew; and the underwriters, therefore, are discharged. This case differs from *Carruthers v. Sydebotham* (a), because there the vessel was moored contrary to the usual way, out of the usual place, and against the express orders of the harbour-master; but here the vessel was moored in the usual way and in the usual place. It is quite clear, that the mere taking of the ground in the ordinary course of the voyage is not a stranding within the meaning of the policy; *Hearne v. Edmunds* (b). Besides, the vessel in this case fell over by the breaking of the rope. The supposed stranding, therefore, was occasioned not by a peril of the sea, but by the breaking of the rope. In *Thompson v. Whitmore* (c) a ship was hove down on the beach, within the tide-way, to repair; the tide knocked away the shores which supported the vessel, and she was thereby bilged and damaged; and this was held not to be a loss by the perils of the sea. That case is in point to shew that the vessel going over in this case was not occasioned by a peril of the sea, but by the breaking of the rope, which was not a peril insured against.

F. Pollock in reply. *Thompson v. Whitmore* is at variance with a later decision of this court in *Fletcher v. Ingdis* (d). In that case a transport, in the service of

(a) 4 M. & S. 77.

(b) 1 Drod. & Bing. 388.

(c) 3 Taunt. 227.

(d) 2 B. & A. 315.

government, was insured for twelve months, during which time she was ordered into a dry harbour, the bed of which was uneven, and on the tide having left her she received damage by taking the ground; and, after argument and time taken for consideration, that was held to be a loss by a peril of the sea. In *Rayner v. Godmond* (a), during the voyage of a ship upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; and the ship having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there; it was held that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of the voyage. So here the loss happened from the breaking of the rope, which was an unforeseen accident, not in the ordinary course of the voyage.

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BAYLEY J. There are two questions in this case. First, Was the ship stranded? and, secondly, if it was, Was there such negligence in the master and mariners of the vessel as to exonerate the underwriters from the loss? The cases of *Busk v. The Royal Exchange Assurance Company* (b) and *Walker v. Maitland* (b), establish as a principle, that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners. Assuming, therefore, that those who had the care of the ship were guilty of negligence, in not pro-

(a) 5 B. & A. 225.

(b) 5 B. & A. 171.

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viding a rope of sufficient strength to fasten the vessel to the shore, and that their negligence was the remote cause of the loss, still, if the proximate cause was a peril insured against, the plaintiffs are entitled to recover. Then, Was this ship stranded? A stranding may be said to take place where a ship takes the ground, not in the ordinary course of the navigation, but by reason of some unforeseen accident; and that rule is consistent with the decision in *Hearne v. Edmunds* (a). In *Caruthers v. Sydebotham* (b) a ship fastened by a rope to the shore fell over on her side when the tide left her, and that was held to be a stranding; and in a subsequent case of *Rayner v. Godmond* (c), it was held, that a ship taking the ground from accident, and not in the ordinary course of the voyage, was a stranding. Did the vessel in this case take the ground in the ordinary course of navigation, or from an unforeseen accident? It appears that she was obliged to go into a tide harbour, which was dry every tide, and was there fastened by a rope to posts on the shore, to prevent her going over. Upon the ebbing of the tide, the rope not being sufficiently strong, gave way, and the vessel fell over upon her side. I think, that so long as the vessel was on the ground, and lashed to the posts on shore, she was not stranded; but when she fell over on her side, and lay on the ground in that position, she was stranded. The falling over, then, was not in the ordinary course of the voyage, but in consequence of an unforeseen accident, out of the ordinary course of the voyage, viz. the breaking of the rope.

(a) 1 Brod. & B. 388.

(b) 4 M. & S. 77.

(c) 5 B. & A. 225.

HOLROYD J. It seems to me that in this case there was a stranding within the meaning of the policy. It is clearly established, that if there be an actual stranding, although it arise from the negligence of the master and mariners, the underwriters are liable. Here the damage accrued in consequence of the vessel's falling over and taking the ground. That falling over was caused by an accident not in the usual course of navigation. I think, therefore, that the vessel was stranded within the meaning of the policy, and that the plaintiffs are entitled to recover.

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LITLEDALE J. There seems to be some contrariety of opinion as to the meaning of the term stranding. That term, in its ordinary sense, means taking the ground, or being on the strand, but that is not the meaning of the word in a policy of insurance. For this vessel's taking the ground in the first instance was not a stranding within the meaning of the policy. I think it immaterial whether a vessel takes the ground when she is in the course of or at the end of a voyage. But when a vessel is on the ground, or strand, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, that is a stranding within the meaning of the policy. In *Hearne v. Edmunds* (a), the taking the ground was no more than was usual with vessels of the same class proceeding up the river to *Cork*. When the vessel was on the ground, she was in that situation in which such a vessel proceeding on that voyage usually is in the river when the tide is low. So here, as long as the vessel lay on the ground fastened to the shore by the rope, she was not stranded; but when the rope broke, and she fell over on her side, and

(a) 1 B. & B. 388.

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lay on the ground, in that position I think she was stranded within the meaning of the policy, because she then ceased to be in a situation in which a vessel driven by stress of weather into the port of *Peele* usually is.

Postea to the plaintiff.

The KING *à*gainst The Inhabitants of LYTCHET
MATRAVERSE.

A pauper, twenty years of age, whose father was settled in the parish of *A.*, contracted to serve the captain of a ship two summers and a winter. He continued in the service until he attained twenty-one years of age; but before that time his father acquired a settlement in another parish: Held, that the pauper was not emancipated before he attained the age of twenty-one, and, consequently, that his settlement followed that of his father.

UPON appeal against an order of two justices, whereby *J. Orchard* and his wife were removed from the parish of *Lytchet Matraverse*, in the county of *Dorset*, to the parish of *Saint James*, in the town and county of *Poole*, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper never acquired any settlement in his own right: his father was settled in the parish of *Lytchet Matraverse*; and whilst he was so settled, the pauper hired himself by contract to serve for two summers and a winter on board a ship trading to *Newfoundland*. In the month of *February* or *March* 1816, being then twenty years of age, he entered upon that service, in which he continued during the stipulated time. There was no evidence that the father exercised any control over him during the period of his service. He attained his age of twenty-one years before his return from the voyage. Shortly after he had left this country, and before he had attained his age of twenty-one years, his father acquired a settlement in the parish of *St. James*, in the town and county of *Poole*. On the pauper's return from *Newfoundland*, he went to reside in his father's house, who before that time had left *Poole* and returned

to

to *Lytchet Matraverse*. After a few weeks he left his father's residence, and lived with his sister, working on his own account as well then as during his residence with his father. The sessions were of opinion that the pauper was emancipated at the time when his father acquired the settlement in *Poole*.

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Barstow in support of the order of sessions. The pauper was emancipated at the time when his father gained a settlement in the parish of *St. James, Poole*. For when he was only twenty years of age he had entered into a contract to serve for two summers and a winter, and he served for the stipulated time. The pauper, therefore, contracted a relation which wholly and permanently excluded the parental control during his minority, and *Rex v. Wilmington (a)* is an authority to shew that he was thereby emancipated. In *Rex v. Rotherfield Greys (b)*, *Bayley J.*, speaking of a soldier, says, "If he had remained in the army till the age of twenty-one years, his emancipation would undoubtedly relate back to the time of his enlistment." So in this case, the emancipation relates back to the time of the contract, and, consequently, the settlement of the pauper did not shift with that of his father.

Bond and Gambier contra. The pauper's emancipation does not relate back to, and is not spread over the whole period of, his absence. The doctrine of relation is confined to those cases in which the son contracts an engagement, which wholly and permanently excludes the parental control. This is not a case of

(a) 5 B. & A. 525.

(b) 1 B. & C. 548.

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that description. *Rex v. Cowhoneyburne* (a) only shews that the pauper became emancipated when she attained twenty-one, but not from the time when, being under age, she ceased to be part of her father's family. *Rex v. Uckfeld* (b) shews that a child being away from his father, and having a separate provision, is not thereby emancipated. The dictum of Bayley J. in *Rex v. Rotherfeld Greys* (c) is the only authority to shew that the doctrine of relation applies to the subject. That was the case of a soldier, and is very different from the present. He had enlisted for life, and by his enlistment put himself wholly under the control of the crown. The king is pater patriæ. His authority is paramount to that of the subject, and wholly supersedes it. But between subject and subject the case is different. Where the child enters into an engagement with a subject, the parental authority is delegated, and not wholly destroyed. If it was held to be wholly annihilated, then it would follow that about one third of the poorer part of the infant population of the country would be in a situation entirely independent of parental control. The present case, therefore, is not one in which the engagement is inconsistent with the relation of father and child. But *Rex v. Huggate* (d) is an authority to shew that the pauper in this case was not emancipated before he attained the age of twenty-one years. There the relation contracted was that of master and apprentice. The apprentice was bound, and served till the age of twenty-one. He could not gain a settlement by that service, because it took place in a parish where his master resided under a certificate. But the certificate did not alter the nature of the engagement, the only

(a) 10 East, 89.

(c) 1 B. & C. 348.

(b) 5 M. & S. 214.

(d) 2 B. & C. 582.

effect of a certificate being to protect some particular parish, and not to prevent parties contracting as servants or apprentices. It was in that case urged in argument that the relation was inconsistent with the father's authority. But the Court held, that during the whole time of the son's service, his domicile continued to be in his father's house. There, indeed, the son occasionally visited the father; but those were visits of mere indulgence, which could not affect the question of settlement or domicile. He was virtually absent from his father's house during the whole of his service. In the present case the son was *actually* absent; but such absence does not occasion any change of domicile; for a minor cannot, except under the provisions of some positive law, change his domicile at all; *conjuges et liberi, quamquam alibi forte agentes, tamen apud maritos parentesque domicilium habere videntur*, Huber. lib. 5. tit. 1. s. 45. His domicile, even when he was in *Newfoundland*, continued to be in *England*; and if in *England*, where was it but in his father's house?

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BAYLEY J. The question in this case is, whether at the time when the father gained a settlement in the parish of *Saint James, Poole*, the pauper was emancipated? If he was not, then his settlement would shift with that of his father. The father was settled in the parish of *Lytchet Matraverse*, and whilst he was so settled, the pauper, his son, being then a minor, hired himself to serve for two summers and a winter. He entered into, and continued in the service until he attained twenty-one years of age, but before he had attained that age his father had acquired a settlement in *Poole*. There can be no doubt that the settlement of a son, if he have none of his own, shifts with that of the parent

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so long as the son continues part of the parent's family: When he ceases to constitute part of the parent's family, he is emancipated. The different instances of emancipation put by Lord *Kenyon* in *Rex v. Offchurch* (a), and *Rex v. Witton cum Twambrooks* (b), and recognised by Lord *Ellenborough* in *Rex v. Uckfeld* (c), are the child's attaining its full age, or being married, or gaining a settlement, or, as in the case of the soldier, contracting a relation inconsistent with the idea of his being in a subordinate situation in his father's family. In *Rex v. Roach* (d), Lord *Kenyon* qualified what he was reported to have said as to a son's being emancipated on attaining the age of twenty-one years, by limiting that observation to cases where the son at that age was severed from his father's family; and then adverting to the case of the soldier, he observes that the soldier had ceased to be under the control of his parents, and had become subject to the control of others; and that as he did not return to the father until after he was of age, the case was thought too clear for argument. It is insisted that this case falls within the fourth class of cases mentioned by Lord *Kenyon*, and that the pauper, as soon as he entered into the contract, like the soldier who had enlisted, was emancipated, because he had subjected himself to the control of others, and continued so subject until he had attained twenty-one. But there is this distinction between the case of the soldier and the present: the soldier, by enlisting, became subject to an authority paramount to that of his parent: here the pauper, by contracting to serve the owner or captain of the ship, subjected himself to an authority not paramount, but subordinate to that of his parent; for, by the law of

(a) 3 T. R. 114.

(b) 3 T. R. 355.

(c) 5 M. & S. 216.

(d) 6 T. R. 247.

England, the parental authority continues until the son attains the age of twenty-one. This distinction is pointed out by *Holroyd* and *Best Js.* in *Rex v. Rotherfield Greys* (a): the latter there says, "By the general policy of the law of *England* the parental authority continues until the child attains the age of twenty-one years; but the same policy also requires, that a minor shall be at liberty to contract an engagement to serve the state. When such an engagement is contracted, it becomes inconsistent with the duty which he owes to the public, that the parental authority should continue." *Lawrence J.* in *Rex v. Roach* (b) seems to take the same view of the subject, and to consider the authority of the state paramount to that of the parent so long as the minor continues in the public service, but as soon as he leaves it, then the parental authority is restored. He there says, "In the case of the soldier, the son was enlisted when he was under age, and if he had returned home before he was twenty-one, he would have been considered as part of his father's family; or, if he had quitted the army before twenty-one without returning home, the father might have reclaimed him by suing out a *habeas corpus*." *Blackstone*, in his *Commentaries*, vol. i. p. 453. says, "The legal power of a father over the persons of his children ceases at the age of twenty-one, for they are then enfranchised by arriving at the years of discretion, or that point which the law has established, when the empire of the father or other guardian gives place to the empire of reason. Yet, till after that age arrive, the empire of the father continues, even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of

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MATHAVENNE.

(a) 1 B. & C. 348.

(b) 6 T. R. 254.

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his parental authority, during his life, to the tutor or schoolmaster of his child, who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." It appears, then, that in ordinary cases the authority of a father over his child continues until the age of twenty-one. But the case of a soldier is an exception from the general rule. For an infant may by law enlist, and become bound to serve the state; and if he does contract to serve and the state adopt him as their servant, that adoption severs him from his father's family, and he then becomes subject to the paramount control of the state. In *Rex v. Woburn(a)*, the son enlisted at the age of sixteen into the same regiment of militia in which his father served, and lived with him to the age of twenty-three. Lord *Kenyon* thought as he lived in his father's family, the parent's control was not altogether destroyed, the guidance and direction of the child to a certain extent not being inconsistent with the occasional military situation in which he was. He seems to have thought that such a person might be subject to a double control. So in this case, if the father did not interfere, the son might be subject to the control of his master whom he had contracted to serve, but being part of his father's family, and subject to his paramount authority, the latter might have claimed his services at any time before he attained the age of twenty-one years. But in the case of a minor who enters into the army, the state will be entitled to his services, and against the public the father cannot claim them. Considering the principle upon which a minor who enlists as a soldier becomes emancipated to be, that he thereby contracts a

(a) 8 T. R. 479.

relation inconsistent with a subordinate situation in his father's family, and considering that a minor who contracts to serve a subject thereby makes himself liable to the double controul of his father and his master, the authority of the parent being paramount to that of the master, I think that the pauper, in this case, when he agreed to serve the owner or captain of the ship, did not contract any relation inconsistent with a subordinate situation in his father's family; but that until he attained twenty-one he continued part of his father's family, and subject to his paramount authority. Consequently the sessions were wrong in holding that the pauper was emancipated, and his settlement shifted with that of his father. Their order must therefore be quashed.

Order of sessions quashed.

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ants of
LYTCHET
MATRAVERS.

do. v. The King 3 Biddle
The KING against The Inhabitants of YNYSYCN-
HANARN, in the County of CARNARVON.

UPON appeal against an order of two justices, whereby they removed *H. Hughes*, his wife, and children, from the parish of *Aberdaron*, in the county of *Carnarvon*, to the parish of *Ynyscynhanarn* in the same county, as the place of settlement by birth of *H. Prichard*, the pauper *H. Hughes's* father, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

It appeared that *Hugh Prichard*, the pauper's father, was born in the parish of *Ynyscynhanarn*, and that the pauper had gained no settlement in his own right; that one *Hugh Williams*, the father of one *Elizabeth Hughes* hereinafter named, resided as tenant on a small farm called *Peny Cwin*, in the parish of *Aberdaron*, and
which

A man, by marrying a woman who was a yearly tenant of premises under the annual value of 10*l.*, held to gain a settlement.

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against
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ants of
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which he held at the rent of 3*l.* 5*s.*, and died there on the 9th of *June* 1782; that previous to the said *Hugh Williams's* death, he made a will, dated the 3d. of *May* 1782, bequeathing all his personal estate and effects, subject to the payment of some small legacies, to his daughter, the said *Elizabeth Hughes* before named, and appointed her sole executrix thereof; that *Elizabeth Hughes* continued to reside at *Peny Cwin* from the time of her father's death until the time of her marriage as after mentioned; that *Hugh Prichard*, the pauper's father, never saw *Hugh Williams*; that the first time *Hugh Prichard* saw the said *Elizabeth Hughes* was, when on her return, after taking her land; that on the 27th of *July* 1782, *Hugh Prichard* married *Elizabeth Hughes*, and thereupon went to reside with her at *Peny Cwin*, where they continued many years; that *Elizabeth*, the wife of *Hugh Prichard*, proved her father's will on the 23d of *May* 1783; that *Hugh Williams* never paid any taxes in *Aberdaron*, nor did *Elizabeth Hughes* while sole, nor *Hugh Prichard* after his marriage (except county-bridge rate), until after the year 1795, and that *Hugh Prichard* never paid more rent for *Peny Cwin* than 7*l.* 18*s.*

The sessions confirmed the order of removal, subject to the opinion of this Court as to the correctness of that conclusion upon the evidence as stated.

Russell Serjt. in support of the order of sessions. The case states that the first time *Hugh Prichard* saw *Elizabeth Hughes* was on her return from taking her land. She took the land clearly before her marriage, and probably within forty days of her father's death; but if she took it before her marriage, the estate which she took as executrix being thereby surrendered, she had no estate which would vest in her husband,

band, so as to give him a settlement. In *Rex v. Ilmington (a)*, the wife, before marriage, had purchased a lease for years, and that having vested by operation of law in her husband, he was held to gain a settlement by forty days' residence upon it; but here the wife was only tenant from year to year.

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against
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ants of
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ARM.

R. V. Richards contra. *Rex v. Stone (b)* is an authority to shew that there is no distinction in this respect between a lease for years and a lease from year to year.

BAYLEY J. The wife in this case was executrix of a tenant from year to year. *Rex v. Stone* shews that an executor of a tenant from year to year of an estate under 10*l.* a year may gain a settlement by residing on it forty days. If, therefore, the wife took the interest as executrix, and in that character became tenant from year to year and married, a settlement would be gained by her husband. If she took the land as tenant for a year, she became tenant from year to year, and the term would vest by marriage in her husband. *Rex v. Ilmington* shews that a man will acquire by marriage the same right to a settlement which an executor or administrator does by the death of the person whom he represents. In that case a woman purchased a leasehold tenement for 6*l.*, and afterwards married, and her husband resided on the premises and died. It was held that the husband by marrying gained a settlement, for upon marriage his wife's estate vested in him by law; and although she could not gain a settlement by purchase, yet her husband having acquired one by it, the widow thereby derived a settlement through him. Here the husband

(a) *Burr. S. C.* 566.(b) 6 *T. R.* 295.

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by marriage acquired, by operation of law, the same interest in the property of his wife which an executor does by death in the property of his testator. The executor of a tenant from year to year, of an estate under the value of 10*l.*, may gain a settlement by residing upon it forty days, because the interest vests in him by operation of law. And, upon the same principle, a husband may gain a settlement by residing forty days upon an estate vesting in him by marriage, although it be of less annual value than 10*l.* I think, therefore, that a settlement was gained in *Aberdaron*, and that the order of sessions must be quashed.

Order of sessions quashed.

See the s. Inhabitants of Llanymaen 4 Ad. 40

The KING against The Inhabitants of the Parish of KINGSWINFORD.

A canal company is rateable to the relief of the poor in every parish through which the canal passes in proportion to the profits which the land occupied by them in such parish yields, and, therefore, where a canal passed through several parishes, in which the tonnage dues payable varied, it was held, that the company were rateable to the relief of the poor of each parish for the amount of tonnage dues actually earned there, and not for a part of the whole amount earned along the whole line of the canal, in proportion to the length of the canal in that parish.

UPON appeal by the company of proprietors of the *Dudley Canal Navigation* against a rate made for the relief of the poor of the parish of *Kingwinford*, in the county of *Stafford*, whereby the company were rated for their canal, reservoirs, path, and tonnage dues, estimated as of the annual value of 60*l.* 2*s.* 2*d.*, at 25*l.* 3*s.* 4*d.*, the sessions reduced the rate to 9*l.* 16*s.* 11*d.*, subject to the opinion of this Court on the following case: —

By the 16 G. 3. c. 66., entitled “An Act for making and maintaining a navigable canal within and from certain lands in the parish of *Dudley*, in the county of *Worcester*, to join and communicate with the *Stour-bridge* navigation in the parish of *Kingwinford*,” it was

enacted,

enacted, that certain proprietors therein named should be united into a company for the better carrying on, making, and maintaining the said canal.

By the 25 G. 3. c. 87., entitled "An Act for extending the *Dudley* Canal to the *Birmingham* Canal," it was, amongst other things, enacted, that from and after the making and completing the said intended canal, the shares created by virtue or in pursuance of that act should become consolidated with the shares in the then *Dudley* Canal Navigation, and all distinction between the same should cease and determine, and the *Dudley* canal, and all matters and things relating thereto, and the canal and other works to be made and completed by virtue of that act, should from thenceforth be and become one joint navigation and concern, and the whole of the income and profits arising from such joint navigation and concern should be paid unto and equally divided amongst all and every the proprietors thereof, according to their respective shares therein.

By the 33 G. 3. c. 121., which was passed for making and maintaining a navigable canal from the *Dudley* Canal to the *Worcester* and *Birmingham* Canal, it was enacted, "that all subscribers, towards carrying on and completing the intended navigation, should be entitled to and should receive, after the said navigation should be completed, a proportion of the profits arising as well from the intended navigation as from the *Dudley* Canal Navigation, according to their number of shares; and every body politic or corporate, person or persons, having such property in the said undertaking, should respectively be deemed proprietors in the whole concern in proportion to every such part or share which they

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they or he should be possessed of towards carrying on the same."

By section 34. it was further enacted, "that the company of proprietors should from time to time be rated to all parliamentary and parochial taxes, rates, and assessments for and in respect of the lands and grounds taken and used by the said company, and all warehouses and other buildings erected or to be erected by the company of proprietors, in the same proportions as other lands, grounds, and buildings lying near the said canal and collateral cuts were or should be rated."

Neither of the recited acts of the 16, 25, or 30 G. 3. contained any clause respecting the mode in which the company should be assessed either to the parliamentary or parochial taxes. The company were empowered to take different rates of tonnage upon those parts of the canal which were made under each of the said recited acts of the 16, 25, and 33 G. 3.

By the 16 G. 3. s. 44. the company were authorized to take certain rates or dues for tonnage therein specified, on goods thereafter to be carried upon any part of the said intended canal, or which should pass through any lock of the said canal.

By the 25 G. 3. the company were empowered to take other and different rates of tonnage from those granted by the 16 G. 3., and therein set out, for all goods thereafter to be carried upon the intended canal; and by section 22. to induce the proprietors of the *Birmingham and Birmingham and Fazeley Canal*, to agree to the aforesaid junction with that canal at *Tipton Green*, and as a compensation for their probable loss of tonnage, in consequence of the intended canal, they were empowered to take certain rates and dues upon all coals and merchandises

dises navigated along the intended canal, according to the rates therein set forth.

By the 33 G. 3., the company of proprietors were authorized to take various and different rates of tonnage from those mentioned in either of the acts of the 16 and 25 G. 3., and which were there enumerated, for tonnage and wharfage of goods, &c. to be thereafter carried upon the intended canal and collateral cuts, &c.; and by section 22., the *Worcester and Birmingham Canal Company* were enabled to receive certain rates of tonnage and wharfage therein mentioned, for such coals and other things which should pass from the intended canal into or upon the *Worcester and Birmingham Canal*, and from the *Worcester and Birmingham Canal* into or upon the intended canal.

The land occupied by the company of proprietors in the parish of *Kingswinford*, for the purposes of the canal, is 12 acres, 2 roods, 36 perches, the whole of which was taken under the recited act of the 16 G. 3., and is one-twelfth part of the land occupied by the said company of proprietors, for the purposes of the whole of the *Dudley Canal*, made under the recited acts of the 16, 25, and 33 G. 3., and extending through the several parishes of *Kingswinford*, *Dudley*, *Tipton*, *Sedgley*, *Rowley Regis*, *Hales Owen*, and *Northfield*.

The account of the tonnage arising upon the whole of the canal made under the said recited acts, and of the expenses and outgoings thereon, is kept as one joint concern and not separately; and the profits of the whole are divided amongst the proprietors generally according to their shares therein.

The total amount of tonnage received by the company of proprietors for the last year on the whole of the canal,
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after deducting the expenses, is 5670*l.* 13*s.* 1*d.*, one-twelfth part of which is 472*l.* 11*s.* 1*d.*, a rate on one half of which sum (236*l.* 5*s.* 6½*d.*) at 10*d.* in the pound is 9*l.* 16*s.* 11*d.*, to which the sessions have reduced the rate. The tonnage received during the same period for goods, &c. carried on that part of the canal, made under the recited act of the 16 G. 3., which is situate in the parish of *Kingswinford*, after deducting expenses, is 1208*l.* 4*s.* 4*d.*, and a rate on the half of that sum (604*l.* 2*s.* 2*d.*) at 10*d.* in the pound is 25*l.* 3*s.* 4*d.*, at which sum the company of proprietors were rated.

The only question for the opinion of this Court was, Whether the different parts or extensions of the canal made under the several recited acts of parliament ought to be taken as one joint concern as far as related to the poor rates, or whether that part thereof, made under the 16 G. 3., ought to be rated as a distinct and separate concern?

Russell and *Whately* in support of the order of sessions. By the acts of parliament under which the different parts of this canal were made, the whole tolls and profits of the canal are to be one entire concern, and are to be divided among the proprietors without any distinction. The tolls collected in the parish of *Kingswinford* are payable to the company as a compensation for the use of the whole line of the canal, and not merely for the use of that part which lies within the parish, *Rex v. Milton* (a), *Rex v. Palmer* (b), and *Rex v. The Oxfordshire Canal Company* (c); and if that be so, then the whole of the tolls constituted the profits of all the land

(a) 3 B. & A. 112.

(b) 1 B. & C. 546.

(c) 4 B. & C. 74.

which

which the company used for the purpose of their canal, and they are rateable in the parish of *Kingswinford*, for that proportion only of the entire profits which the land occupied by them in that parish bears to the whole of the land occupied by them for the purposes of the canal.

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BAYLEY J. It seems to me that in amending this rate the sessions have not adopted the correct rule. The canal company are to be rated under the statute of the 43rd of *Elizabeth*, as occupiers of land in the parish of *Kingswinford*. Tolls, *eo nomine*, are not rateable; but if the subject matter out of which the tolls arise, be one mentioned in the statute of *Elizabeth* as the object of rate, then that may be rated by name, and the tolls which constitute its profits may be thus made to contribute to the relief of the poor. A canal company, therefore, is liable to be rated in respect of the land which they occupy in every parish through which the canal passes, and for that value which the land there produces. Where there is a long line of canal extending through different parishes, although the money produced by the tonnage collected in all the parishes, constitute one common fund out of which all the expences are to be borne, still the proportion which those expences may bear to the tolls collected, even in cases where the rates are the same along the whole line of the canal, may vary in different parishes. The traffic on the canal may be greater in some parishes than others, or the rates may be unequal, and thus the net profits, which constitute the value of the land used for the canal, may vary in different parishes. There are twelve

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miles in length of the canal in the parish of *Kingswinford*. Assuming that the different branches of the canal had been made under one act of parliament; I am of opinion that the company ought to be rated in each particular parish in proportion to the profit which they derive from the land there used by them for the purpose of the canal. If a canal runs through six different parishes, and there is the same traffic through the whole line of the canal, every part of the canal will earn an equal proportion of the tolls. But it may happen that in that part of the canal situate in one parish, there may be double or treble the traffic which there is in any other of the six. Why are the other parishes to have any part of the tolls earned in that parish? The land in those parishes contributes nothing towards earning the sum derived in the other parish from the use of the land there. The true principle is this: a canal company is to contribute to the relief of the poor in each parish through which the canal passes in proportion to the profit which they derive from the use of their land in that parish. If the profit arising from a given quantity of land vary in different parishes, the rate must vary in the same proportion. The whole rate will be payable out of one common fund. But then each parish will receive from the company a sum in proportion to what the land in that parish produces. If in this instance this rule has the effect of making the rate in *Kingswinford* higher, it will also make the rate lower in other parishes. For these reasons it appears to me that in this case the sessions have not proceeded on the correct principle, but that they ought to have rated the company for the tonnage received by the company on that part of the canal

canal which is in *Kingswinford*, and that, therefore, the rate ought to be amended by making it 25*l.* 3*s.* 4*d.*

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ants of
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HOLBOYD and LITLEDALE J*s.* concurred.

Rate amended.

Stutt was to have argued against the order of sessions.

DOE on the demise of R. WERE, W. WERE, and
S. WERE, against COLE.

EJECTMENT for the recovery of the moiety of certain lands and premises, situate in the parishes of *Loddiswell* and *Churstow*, in the county of *Devon*. At the trial before *Gaselee J.* at the last assizes for the county of *Devon*, the plaintiff had a verdict, subject to the opinion of this Court on the following case:—

The lessors of the plaintiff made title under a deed of conveyance from one *Walter Prideaux*, which recited, that he was indebted to them in a sum of 3000*l.*, and that he had agreed to secure the same by demising and assigning the premises thereafter mentioned; that in pursuance of an agreement recited in the deed, and in consideration of 5*s.*, he *Prideaux* did demise, lease, grant, assign, transfer, and set over, direct, limit, and appoint unto *R. Were*, *W. Were*, and *S. Were*, as trustees, their executors, administrators,

Where the owner of certain lands, by deed, describing them as in the possession of himself and *A. B.*, granted, assigned, transferred, and set over, directed, limited, and appointed the same to *C. D.* for life, but no livery of seisin was made: Held, that the deed operated as a valid grant of the reversion of that part of the premises in the occupation of *A. B.*

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and assigns, all that moiety or half part of and in all that messuage, &c. lying and being in the town of *Kingsbridge*, and therein particularly described, which said premises were then in the tenure or occupation of the said *Prideaux*, and the reversion, remainder, rents, issues, and profits thereof, and of every part thereof; and also all that the moiety of and in all that capital messuage *Barton Farm*, and demesne lands called or commonly known by the name of *Hatch Arundel*, situate, lying, and being in the parishes of *Loddiswell* and *Churstow*, in the county of *Devon*; and which said last-mentioned premises were heretofore in the possession of one *A. Rendell* and of the said *W. Prideaux*, and do contain in the whole by estimation 150 acres or thereabouts (be the same more or less), and are now in the possession of the said *W. Prideaux* and of *Samuel Cole*. The indenture then, after describing two other moieties or half parts undivided of a messuage and tenement, and of a barn situate in the parish of *Loddiswell*, in the possession of *Joanna Saunders*, proceeded as follows: "and all houses, outhouses, &c. profits, &c. hereditaments and appurtenances whatsoever to the said moieties belonging, and the reversion and reversions, remainder and remainders, rents, suits, and services thereof, and of every part thereof, and all the estate, right, title, interest, term and terms of years, use, trust, property, claim, and demand whatsoever of him, *W. Prideaux*, his heirs or assigns, either in law or equity, of, into, or out of the same or any part thereof, to have and to hold the said moiety, or half part of the said messuage, tenement, or dwelling-house in *Kingsbridge*, with the appurtenances, unto the said *R. Were*, *W. Were*, and

and *S. Were*, their executors, administrators, and assigns, from the date of the indenture, for and during, and unto the full end and term of 2000 years thence next ensuing, and fully to be complete and ended, yielding and paying, therefore, yearly and every year during the said term, unto him, *W. Prideaux*, his heirs or assigns, the rent of one pepper corn if the same should be lawfully demanded; and to have and to hold all and singular the several moieties or half parts hereby demised and assigned, or mentioned, or intended so to be, situate, lying and being in the several parishes of *Loddiswell* and *Churstow*, with their, and each and every of their several and respective rights, members, and appurtenances unto the said *R. W.*, *W. W.*, and *S. W.*, their executors, from the day of the date thereof, for and during all the natural life of the said *W. Prideaux* without impeachment of waste."

The trusts as to all the premises were declared to be for sale, when *R. W.*, *W. W.*, and *S. W.* should think proper. There were covenants by *W. Prideaux*, that he had full power to convey the same, and a right of entry given to *R. W.*, *W. W.*, and *S. W.* This indenture was duly executed by *W. Prideaux* at the time of its date, no livery of seisin was indorsed on it, and no evidence was offered that any had in fact been made.

The defendant, *Samuel Cole*, before and at the time of the execution of this indenture, was tenant from year to year to *W. Prideaux* of part of the lands and premises comprised in the deed, and therein described as being situate in the parishes of *Loddiswell* and *Churstow*.

After the execution of this indenture, viz. in October 1825, *W. Prideaux* became a bankrupt, and the defend-

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WEEK
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Deo demt
Wm F
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ant, *S. Cole*, having disclaimed to hold under the lessors of the plaintiff, defended this action of ejectment under an indemnity from the assignees of *W. Prideaux*.

Follett for the lessors of the plaintiff. The question in this case is, whether the deed was sufficient, without livery of seisin, to pass the estate in the lands in the parish of *Loddiswell* to the lessors of the plaintiff for the life of the grantor. The lessor of the plaintiff had a reversion expectant on the determination of *Cole's* tenancy, and that will pass by the word *grant* without livery. It is true, that in order to pass a freehold interest in possession, livery of seisin is essential, unless the conveyance takes effect under the statute of uses; but, a reversion expectant on an estate of freehold, or for years, passed by grant with the attornment of the tenant before the statute of the 4 *Anne*, c. 16. s. 9. *Co. Litt.* 49 a. 2 *Blackst. Com.* 317. *Shepherd's Touchstone*, 210. 229. 1 *Saund.* 232. n. 8. *Bacon's Abridgment*, Lease N. And if it so passed then, it will, since the statute, pass by grant, without the attornment of the tenant. It may, perhaps, be said, that although a reversion expectant on the determination of a freehold term would pass by the deed, yet that this being a reversion expectant on the determination of a term for years, it will not pass; but *Littleton*, ss. 567, 568., and Lord *Coke's Comment* on the latter section, and *Littleton*, s. 572. shew, that there is no distinction in this respect between a reversion expectant on the determination of a freehold term, and one expectant on the determination of a term for years. A tenancy from year to year is a term for years; *Botting v. Martin* (a). Assuming that the deed was not intended to

(a) 1 *Campb.* 517.

pass the reversion; it was clearly intended to pass the land; and if the words in the deed are sufficient for that purpose, the Court will give effect to the intent; *Roe v. Trimmer* (a), *Höggerston v. Manbury* (b).

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Warr.
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Coleridge contra. It must be conceded, that a person seised of a freehold, of which a lessee for years is in possession, may transfer his reversionary interest by deed without livery of seisin. But here, *Walter Prideaux* was in possession of some part of the premises intended to be conveyed, and those will not pass by this deed. This action is brought to recover those premises, of which *Cole*, at the time when the deed was executed, was in possession. The deed does not profess to grant the reversion of any premises; it describes the premises sought to be recovered, as being in the possession of *Walter Prideaux* and of *Samuel Cole*. It is clear, therefore, that it was the intention of the parties that an immediate possession of the lands, and not the mere reversion of them, should pass. It is a presumption of law, resulting from the deed, that *Prideaux* and *Cole* were joint-tenants of the estate; and then the possession of one would be the possession of both. Now if a grantor and his tenant are in possession of an estate, and the deed of grant does not point out what part was in his own possession, and what in that of the tenant, but professes to pass an immediate freehold, the one will not pass without livery of seisin, and the other will not pass, because it was not the intention of the grantor.

BAYLEY J. It is laid down distinctly, in *Co. Litt.* 49 a., "that if a man be seised of two acres in fee, and letteth

(a) 2 Wils. 75.

(b) 5 B. & C. 101.

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DOZ dem.
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 against
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one of them for years, and intending to pass them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession in name of both, only the acre in possession passeth by the livery. Yet if the lessee attorn, the reversion of that acre shall pass by the deed and attornment." And Lord Coke afterwards says, "So it is if any man make a lease, and by deed grant the reversion in fee, here the freehold with attornment of the lessee by the deed doth pass, which is in lieu of livery." Now that is an authority to shew, that where lands are in possession of a tenant, the reversioner may convey his interest by deed. All lands lie in livery or in grant: and they do not lie in livery where the party intending to convey cannot give immediate possession. Here *Prideaux* had the freehold in him, but the right of possession was in his tenant. He, therefore, had a reversion expectant on the determination of the term. Now a reversion, which is a vested right, lies in grant. There can be no doubt that this instrument has words fully sufficient to operate by way of grant. On the short ground, that where the right of possession is in a tenant for years, the right of the landlord is a reversion expectant on the determination of the tenancy, and lies in grant, and not in livery, I am of opinion that the reversion of the lands sought to be recovered passed by the deed.

HOLROYD J. The passage cited from *Co. Litt.* 49 a, is decisive to shew that the reversion passed by this deed to the lessors of the plaintiff.

LITLEDALE J. If *Prideaux* had been in actual possession of these premises, and intended to have conveyed

veyed his interest to a stranger, he ought to have delivered seisin. But possession being in a tenant from year to year, *Prideaux* had only a reversion, and in order to convey that reversion to the tenant in possession, must have released his right; but the proper mode of passing a reversion to a stranger not in possession is by grant. Here *Prideaux* has granted the reversion by the deed in question to the lessors of the plaintiff, who are entitled to recover.

Judgment for the plaintiff.

The KING against The Inhabitants of GREAT BOWDEN.

UPON appeal against an order of two justices, whereby they removed *J. Harding*, his wife, and children, from the hamlet of *Sutton*, in the parish of *Castor*, in the county of *Northampton*, to the parish of *Great Bowden*, in the county of *Leicester*, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper, *J. Harding*, came to one *Hamshaw*, an innkeeper, residing in the parish of *Great Bowden*, and asked for a place. *Hamshaw* had no objection, and put him on as an ostler, but said that he did not mean him to have a settlement, as the parish was very particular. No earnest or wages were given, but the pauper was to have what he got as ostler. He had his lodging and

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Upon a special case, the court of quarter sessions found, that a pauper hired himself as ostler to an innkeeper, that no earnest or wages were given, but he was to have what he could get as ostler, and he lodged and boarded in his master's house, and that either the master or servant might have determined the service when they pleased; it was held, that, upon this finding, this

latter stipulation must be taken to have been part of the contract between the parties, and, consequently, that there was not any general or yearly hiring, and that no settlement was gained by serving under it.

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his board in his master's house. The pauper could have left at any time he pleased, or the master might have turned him away at any time. The pauper lived with *Hanshaw* as ostler under these terms about a year and a half. The sessions were of opinion that this was a general hiring, followed by a service of above a year, and that the master's remarks at the time of hiring could not prevent the pauper from gaining a settlement.

Thesiger, in support of the order of sessions, contended it was a term implied in every general hiring, that either party should be at liberty to determine the service when he pleased. [*Bayley J.* If that be so, it would not be a hiring for a year; under a yearly hiring the servant is bound to serve, and the master to employ him, during the whole year.] Then it must be admitted, that if it were part of the original contract that either party should be at liberty to determine the service when he pleased, there was not in this case any hiring for a year, but that is a fact found by the sessions, and a conclusion drawn by them from the evidence, and founded perhaps on the opinion entertained by the master and the servant of their rights under the contract. That opinion, however, cannot alter the effect of the contract, which, being general, was, in law, a contract for a year. *Rex v. Stockbridge (a)*.

Nolan, contra, was stopped by the Court.

BAYLEY J. This clearly would be a general hiring, unless it were a term engrafted upon the contract that

(a) *Burr. S. C.* 759.

the pauper might leave, or that the master might turn him away at any time. It is said that this is a mere conclusion drawn by the sessions from the evidence, and that it was not a condition engrafted on the contract; but inasmuch as a general hiring has been held to be a hiring for a year, and as in a yearly hiring there is no such condition implied by law that either party shall be able to determine the service at any time, I think we must take it upon the finding that it was part of the contract, that the parties should be at liberty so to do in this case; and if that be so, then the cases of *Rea v. Christ Parish, York* (a), and *Rea v. Trowbridge* (b) are decisive authorities to shew that the contract in this case was not a hiring for a year. No settlement, therefore, was gained by the service under it, and the order of sessions must be quashed.

HOLROTH and LITTLEDALE Js. concurred.

Order of sessions quashed.

(a) 3 B. & C. 459.

(b) Cited by Bayley J. in *Rea v. Christ Parish, York*, 3 B. & C. 462.

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The KING *against* The Inhabitants of
TROWBRIDGE.

A pauper first recollected himself in the workhouse of the parish of *A.*, when he was about four years of age. He remained there till he was thirteen or fourteen years of age. He afterwards married, and lived in another parish, but when out of work, he returned on two different occasions to the parish of *A.*, and was not only relieved by the officers of that parish, but received money from them to enable him to return to the parish where he lived. The sessions having found that he was not settled in the parish of *A.*, the Court affirmed their decision.

The fact of the pauper's remembering himself, when four years of age, in the parish of *A.*, is no evidence that he was born there.

UPON appeal against an order of justices, whereby *M. Acorn*, and his wife, and children, were removed from the parish of *Trowbridge*, in the county of *Wilts*, to the parish of *Chatham*, in the county of *Kent*, the sessions quashed the order, subject to the opinion of this Court on the following case:

The pauper's first recollections were of his being in the workhouse at *Chatham*; he supposed he might be then about four or five years old. He never knew his father; and his mother was not in the workhouse with him. He staid in the workhouse until he was thirteen or fourteen, when he entered on board a man of war, and served in various ships till the year 1814. He then went to *Trowbridge*, and married there. Being out of work at *Trowbridge*, he went, with his wife, to the workhouse at *Chatham*, where he stayed more than three weeks, during which time he was maintained there by the parish of *Chatham*, and on going away was furnished by the parish officers of *Chatham* with one pound in money, and a pair of shoes for him and his wife to return to *Trowbridge*. He returned thither, and remained there about ten years, when, being again out of work, he went to *Chatham* again, with his wife and family, and stayed there about three weeks in the workhouse, and whilst there, was maintained by *Chatham*, and at the expiration of that time received

ceived one pound in money, and a pair of shoes for himself, his wife, and each of his children, and provisions to return to *Trowbridge*; at the same time he was desired by the *Chatham* overseers not to return to *Chatham* again without an order or pass. He then returned to *Trowbridge*, at which place he was afterwards relieved, and thereupon moved, by order of magistrates, to *Chatham*. The parish registers of *Chatham* were searched by the pauper, but no entry was found of his baptism, nor of any person bearing his name.

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Bingham in support of the order of sessions. Relief given to a pauper resident within the relieving parish, is no evidence to prove a settlement, because overseers are bound to give relief whether the pauper be settled there or elsewhere, *Rex v. Chadderton* (a). In that case the relief was confined to a single instance, but in *Rex v. Chatham* (b), relief had been given several times to the pauper's husband; and he had in two instances been received into the poor-house for a fortnight together, and had been buried at the expence of the parish; and there was no evidence to shew a settlement in any other place, and still it was held to be no evidence of a settlement in the relieving parish. So in this case the parish officers were bound to maintain the pauper while he was resident within the parish, whether he was settled there or not; and, therefore, the relief given was no evidence of settlement. It is clear that there was no evidence that the pauper was born in *Chatham*, for the baptismal register has been held not to be evidence of the place of

(a) 6 East, 27.

(b) 3 East, 493.

birth,

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Thornham.

birth, *Ree v. North Petherton* (a); A fortiori, the mere circumstance of the pauper's recollecting himself to have been in a parish when he was four or five years of age, is not any evidence that he was born there. Besides, there was no registry of baptism found at *Chatham*, nor any entry of the baptism of any person bearing his name. Assuming that in this case there was some evidence for the sessions to presume that the pauper was settled in *Chatham*, it was a question of fact for their decision. The pauper was relieved in *Thornbridge* as well as in *Chatham*, and the presumption is, that the relief given in *Chatham* was given to him as casual poor, and not as a person settled in the parish. It was for the sessions to draw their own conclusion from the evidence, and having done so, this Court will not disturb their decision.

Merrett's Serjt. It is now too clearly established by *Ree v. Chatham* (b), to be disputed, that relief given to a pauper resident within the relieving parish, is not evidence of a settlement in that parish. But this case is distinguishable from that. The parish officers of *Chatham* not only continued to relieve the pauper for a great length of time, but after he had ceased to reside in *Chatham*, he returned on two different occasions, and was not only relieved by the parish, but had money given him to go elsewhere. That money was intended to support him after he had left the parish, and was in effect the same thing as if the parish officers had relieved him while he was resident in another parish. In the *Duke of Rutland v. Broughton* (c), *Holt C. J.* said, "where a child

(a) 5 B. & C. 508.

(b) 6 East, 498.

(c) *Comberbach*, 364.

is first known to be, that parish must provide for it till it find another;" that learned Judge seems, therefore, to have thought that that was sufficient to raise a presumption that he was settled in that parish by birth. He may be illegitimate, and in that case would gain a settlement by birth.

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The Inhabitants of
Tottenham.

BAYLEY J. If the decision in the case of *Rees v. Chatham* (a) establishes as a principle of law, that the bare fact of giving relief to a pauper while he is resident within a parish, is no evidence that he was settled there, it is manifest that the facts proved in this case could lead to no other legitimate conclusion, than that which the sessions have drawn from them. It is not necessary to decide in this case, whether the giving relief to a party resident within a parish, may or may not under certain circumstances be evidence from which the sessions may conclude that the party so relieved was settled in the relieving parish. For assuming that there was some evidence in this case to warrant such a finding, it was for the sessions to draw their own conclusion from the whole evidence. They have done so, and I think there is nothing stated in this case to warrant us in saying that their conclusion is wrong. It appears that the pauper first recollected himself in the workhouse at *Chatham*, and being in the workhouse at *Chatham*, the parish officers of that parish were bound to maintain him until they could ascertain where his settlement was, and that might be a very difficult matter. The relief given under such circumstances, was no evidence that the pauper was settled in the parish, because the parish officers were

(a) 8 East, 498.

bound

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bound by law to maintain him until they could ascertain where his settlement was. It is true that the pauper on two occasions returned to *Chatham*, and was not only relieved by that parish, but had money given to him to take him back to *Trowbridge*, which, it has been said, was equivalent to relieving him, while resident in another parish. Relief given to a pauper while he is resident in another parish, is a distinct acknowledgment by the relieving parish, that they believe him to be settled there. But giving the pauper money to enable him to remove to *Trowbridge*, was no acknowledgment by *Chatham* that he was settled there. Assuming, therefore, that it was questionable upon the evidence, whether the relief was given to the pauper as a settled inhabitant or not, and that the sessions might have inferred that the pauper had been relieved by *Chatham*, because he was settled there, that was not a necessary conclusion. Being a question of fact, it was for the sessions to draw their conclusion, and I cannot say that their decision is wrong. The mere fact of the pauper's having first remembered himself in *Chatham*, when he was four or five years of age, is not any evidence of his having been born in that parish. Upon the whole, I think that the sessions have drawn the proper conclusion from the evidence, and that their order must be confirmed.

Order of sessions confirmed.

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The Marquis of STAFFORD *against* COYNEY.

TRESPASS for breaking and entering the plaintiff's close with carts and horses, and breaking posts and chains. Pleas, first, not guilty. Secondly, a public highway over the locus in quo, and that the posts and chains were wrongfully placed there by the plaintiff. Replication, traversing the highway and new assignment of trespasses extra viam with carts laden with coals. Plea, a public highway over the locus in quo, for carts laden with coals, and issue thereon. At the trial before *Garrow B.*, at the *Stafford Lent* assizes, 1827, it appeared in evidence, that in the month of *February* 1820, several persons residing at *Lane End*, being anxious to open a communication between that place and *Weston Coyney*, sent a petition to the plaintiff (who had lands lying between those two places) for his concurrence. The plaintiff's agent wrote and sent to several of the petitioners an answer containing the following observations: "It must not be forgotten, that Lord *Stafford's* estate, through which the projected road is wished to be carried, is full of coals open to the market, and in course of being worked. Under these circumstances, his Lordship considers the conveyance through this estate, of coals belonging to other proprietors, to be quite inadmissible, and if any road is opened, he will expect that a prohibition of the carriage of such coals through his estate shall be part of the plan. It will, of course, be understood that Lord *Stafford* considers the other land-owners fully entitled to lay

Where a land-owner suffered the public to use, for several years, a road through his estate for all purposes, except that of carrying coals: Held, that this was either a limited dedication of the road to the public or no dedication at all, but only a licence revocable; and that a person carrying coals along the road after notice not to do so, was a trespasser.

Semble, That there may be a limited dedication of a highway to the public.

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the same prohibition on the conveyance of coals through their estates, which it appears necessary to stipulate for in his own case." A communication, signed by several inhabitants of *Lane End*, saying that they should be glad to have the road made upon the terms above mentioned, was afterwards sent to the plaintiff's agent. The road was accordingly commenced, that part of it which ran through the plaintiff's estate was made by him at his own expence, the residue was made under the superintendence of the surveyor of the highways, and paid for by subscription. None of the other land-owners insisted upon any prohibition as to coal-carts passing through their estates. The road was completed and opened to the public in *October 1820*. About a year after, the plaintiff caused two posts to be erected, one at each side of the road running through his estate, and to one of these a chain was attached. Several instances were proved, in which a servant of the plaintiff had, by the directions of his agent, stopped coal-carts passing along that part of the road, by putting the chain across it. In 1826, the driver of a coal-cart being stopped, broke the chain by direction of the defendant, and passed along the road, through the plaintiff's estate, and for this alleged trespass the action was commenced. On the part of the defendant, many instances were proved, in which coal-carts had passed along the road in question without interruption, and it did not appear that carts or carriages of any other description had ever been interrupted. It was also proved that the plaintiff's steward, when applied to on the subject of repairing this part of the road, replied that Lord *Stafford* would have nothing more to do with it, and that the parish might repair it or suffer it to be indicted. It was afterwards repaired at the expence of the parish, and statute-duty was done

done upon it. Upon this evidence for the defendant, it was contended that by throwing open the road to the public for a whole year without putting up a chain, the plaintiff had dedicated it to them for all purposes, and that he could not afterwards restrict the uses of it. Or if that were not so, still that the suffering the road to be repaired by the surveyor of the highways, at the expence of the parish, amounted to an abandonment of the restriction upon the original dedication. The learned Judge told the jury that a dedication to the public for a year was a dedication in the eye of the law, and that if there was a dedication, the agreement could not bind the public rights. And he left it to them to say whether there was a dedication. Under this direction the jury found a verdict for the defendant, but the learned Judge gave the plaintiff leave to move to enter a verdict in his favour for 1s., if the Court should think him entitled to recover upon the case as proved at the trial. A rule nisi for that purpose was obtained in *Easter* term; against which

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Jervis and *Russell* Serjt. shewed cause. There are two questions in this case, first, Whether the plaintiff could ~~make the~~ exception in question? as he clearly intended to make the road public sub modo. There is no instance of such a restricted public highway. [*Holtz J.* Could not the plaintiff give a public road for certain purposes only, ex gr. for a footway?] Yes, but then he could not exclude any persons on foot; so here, having made a road public for horses and carts, he cannot exclude any carts. The next question is, Whether the restriction, if it could by law exist, was not in fact abandoned? It appeared that the plaintiff's agent, when spoken to as to the state of the road, and

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some threat of indictment, declared the plaintiff would have nothing more to do with it; that the parish might repair or suffer it to be indicted, as they thought fit. That was a clear relinquishment to the parish of all right in the road; and the surveyor of the highways from that time, with the knowledge of the plaintiff's agent, always repaired the road, and caused statute-duty to be done upon it.

Taunton and *Campbell* contra, were stopped by the Court.

BAYLEY J. I am of opinion that this rule must be made absolute. If in law there can be a partial dedication of a highway to the public, it seems to me that the road in question was so dedicated. I am disposed to think that there may be such a dedication, but if not, then in this case there was no dedication at all. The defendant contends, that there was a general dedication; but looking at the whole of the evidence, it is impossible to say that the plaintiff ever intended so to give the road. The public must take *secundum formam doni*; if they cannot take according to that, they cannot take at all. Neither was there any sufficient evidence of a subsequent unrestricted dedication to the public. User is evidence of dedication, but it is evidence only; and most of the instances in which coal-carts had been stopped had occurred during the two years next before the trial.

HOLROYD J. I am of opinion that the public have no right to the road in question, except according to the grant of Lord *Stafford*, to be proved either by user or by the letter of his agent. In principle I see no
objection

objection to a partial dedication: and, at all events, the right given cannot be more extensive than the gift imports. If a restriction cannot by law exist as to a public way, then the grant was only a licence revocable. Perhaps, indeed, an user of the way beyond the restricted right might not make an innocent party a trespasser; for the sufferance of such more extensive user, without objection, would be evidence of licence. But in this case there was no such licence, and, therefore, the plaintiff is entitled to recover.

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LITTLEDALE J. I entertain some doubt as to the possibility of making a partial dedication; but, at all events, there was not in this case any evidence of a general dedication, and therefore the plaintiff is entitled to have the verdict entered in his favour.

Rule absolute (a).

(a) See *Roberts v. Karr*, 1 Campb. 262. n. *Rex v. The Inhabitants of Northamptonshire*, 2 M. & S. 262.

REED *against* DEERE.

ASSUMPSIT. The declaration stated, that on, &c. at, &c. it was agreed by and between the plaintiff and defendant to refer two causes, in one of which *Reed* was plaintiff and *Deere* defendant, and in the other *Reed* was plaintiff, and *Deere* and one *Cook* defendants, to *A. B.* on the usual terms, and that the costs should

Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately;

and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: Held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiff could not exclude the second agreement and proceed upon the counts setting out the first only.

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be in his discretion, and the reference should be made a rule of court in the usual manner; and afterwards, to wit, on, &c. it was *further agreed* between the said parties, that all costs should be in the arbitrator's discretion, and that the parties should abide by the arbitrator's decision, touching the subject-matters of the said two actions, and what he should see fit to be done by the parties thereto respectively, so that his award should be made on or before the first day of *Michaelmas* term then next, or such further day, not exceeding the first day of *Hilary* term then next, as the arbitrator might appoint. Breach, that defendant revoked the authority of the arbitrator, whereby plaintiff lost the benefit of great expenses incurred by him in preparing to proceed upon the reference. There was another count stating the first agreement only, and others stating generally that the parties had agreed to refer certain matters in difference, and that the defendant afterwards revoked the arbitrator's authority. Plea, the general issue. At the trial before *Bosanquet* Serjt., at the *Hereford* Spring assizes, 1827, on behalf of the plaintiff a letter was produced written by the defendant, wherein he said, "I consent to the causes (those mentioned in the declaration) being referred to *A. B.* in the usual terms, and the costs to be in his discretion, and the reference to be made a rule of court in the usual manner." The plaintiff's attorney sent an answer accepting the proposal, and this was stamped with an agreement-stamp. The defendant and the attorney for the plaintiff afterwards met before the arbitrator, and then indorsed and signed upon the back of the letter above mentioned, written by the defendant, the second agreement stated in the first count of the declaration. This was not stamped. *Campbell,*

bell, for the defendant, contended that this second agreement varied materially from the first, and could not be read in evidence for want of a stamp; and that the first agreement could not support the action, that having been put an end to by the second. For the plaintiff it was contended, that he might rely upon the count stating the first agreement only. The learned Judge being of a different opinion, directed a nonsuit. In *Easter* term a rule nisi for a new trial was granted; and now

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Campbell shewed cause. The decision of the learned Judge at the trial was perfectly correct. The counsel for the plaintiff produced both the agreements in support of the action; the second was not allowed to be read for want of a stamp. Then he contended for a right to rest his case upon the first agreement alone; but as a second had been produced, which, in the opinion of the learned Judge, varied materially from the first, the plaintiff was in the same situation as if that first agreement had never been made. Suppose the plaintiff had recovered upon the first agreement, then by stamping the second he would have been in a situation to maintain another action. *Hill v. Patten* (a) is directly in point. [*Bayley* J. There the party declared upon the policy as altered.] Another action was afterwards brought by *Hill's Assignees v. Patten* (b), describing the policy as it stood before the alteration, but the result was the same.

Russell Serjt. contrà. An instrument altered whilst in fieri requires only one stamp. [*Holroyd* J. The second

(a) 8 East, 373.

(b) 1 Campb. 72. 9 East, 351.

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letter accepting the proposal for a reference made it binding; it was, therefore, no longer in fieri.] Then the plaintiff had a right to go upon the first agreement, and the defendant could not have the second read in evidence to shew that it varied from the first, because it was not stamped. In *Robson v. Hall* (a) an agreement to make a bet was produced in evidence duly stamped: it appeared that after the agreement was made, the parties wrote upon it that they agreed to double the bet: this was held to be a new agreement requiring a new stamp; but the paper was received as evidence of the first agreement, and upon that the plaintiff recovered. [*Holroyd J.* That might be treated as two distinct bets, each of which required a stamp, but the first was not varied by the second.] The case of *Hill v. Patten* has already been distinguished from the present; and in *French, Assignee of Hill, v. Patten* (b) Lord *Ellenborough* treated the policy as defaced, and altogether destroyed, so that no stamp could render it available.

BAYLEY J. I am of opinion that the nonsuit in this case was right. In *French v. Patten* it was established, that if the parties to an agreement, after they have signed it, introduce an alteration which cannot be read in evidence for want of a stamp, still the old agreement is at an end. There the alteration was upon the face of the instrument, here upon the back of it; but that does not appear to make any material distinction; for if the Judge sees that the first agreement has been determined, he may act upon that knowledge. It would be against the policy of the revenue laws to allow a party in such a case to resort to the first agreement. It has

(a) *Peake, N. P. C.* 127.(b) 1 *Campb.* 72.

been

been argued that there might be two agreements subsisting, and that the plaintiff had a right to rely upon either that was in a condition to be read. But if they are inconsistent, one must supersede the other. Now the original agreement left the time for making the award unlimited, and that was fixed by the second. Putting aside all consideration of the stamp laws, the first agreement was no longer in force after the second had been made.

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HOLROYD J. I am of the same opinion. According to the judgment of *Le Blanc J.* the case of *French v. Patten* differs in one respect from this. He observes, that the alteration was made upon the very face of the instrument; and proceeds, "I cannot say that it is the same thing, as if the memorandum had been written on a different instrument." But it seems to me that as soon as it appeared on the plaintiff's case that some further arrangement had been made after the first agreement was signed, he was bound to shew what that new arrangement was, in order to prove that the old agreement was still in force. It has been urged that the new agreement could not be received in evidence at all, either for or against the plaintiff. But although, under such circumstances, the Court cannot notice the particulars of the agreement, it may take notice that an agreement has been made relating to the subject-matter of the action. It is every day's practice, when a witness gives parol evidence of a contract, to ask, whether it was reduced into writing? If he says it was, the Court must take notice of the existence of that writing, and require it to be produced. And if it be not stamped it cannot be read in evidence, and the plaintiff's case fails.

LIT-

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against
Dunn.

LITTLEDALE J. The terms of the first agreement were qualified by the second. Then the first agreement taken by itself is at an end. As to the alteration not being upon the face of the instrument, I cannot understand how it makes any difference whether the alteration is so made, or upon another part of the same paper, or upon a different paper. The effect is the same in each case. Then, as to looking at the second agreement, the Court may, in all cases, so far allow parol evidence of a written agreement as to ascertain that it relates to the subject-matter in discussion. If, indeed, a plaintiff gets through his case without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it unless it be duly stamped.

Rule discharged.

DE BEAUVOIR *against* WELCH and Another.

By the general
turnpike act,
3 G. 4. c. 126.
s. 86., it is
enacted, "That
after any new
road shall be
completed,

TRESPASS for destroying gates and fences. Pleas, first, not guilty. Secondly, public right of foot and carriage way over the locus in quo. Issue thereon. At the trial before Burrough J., at the *Berkshire* Summer
the lands or grounds constituting any former roads or road, or so much and such part or parts thereof, as in the judgment of the trustees may thereby become useless or unnecessary, shall and may be stopped up, and discontinued as public highways (unless leading over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town or place, lands or tenements, to which such new road does not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals):" Held, that the exception did not take away from the trustees the power of stopping up the roads therein mentioned, but left them at their discretion to do so or not, and, therefore, that the trustees might stop up, and give up to the owner of the adjoining land an old road leading to a church, &c., to which the new road did not immediately lead.

assizes

assizes in 1826, the plaintiff had a verdict subject to the opinion of this Court on the following case:—

The locus in quo had formed a part of an old turnpike road, leading from the south end of *Bostock Lane*, in the *Bath* road, to *Hogmoor Coppice*, on the way towards *Pangbourn*. It was bounded on both sides by lands, which, with the exception of two fields, belonged to the plaintiff. In 1825, the trustees of this road formed a new line of road from the south end of *Bostock Lane* to *Hogmoor Coppice*, over the plaintiff's lands. After the new road was opened to the public, they made an order, dated the 6th of *February* 1826, that so much of the old turnpike road leading from the south end of *Bostock Lane* towards *Hogmoor Coppice*, as lay between the point at which the said old turnpike road touched the road leading from *Reading* towards *Speenhamland*, and the point at which the said old turnpike road touched the road leading from the said *Reading* and *Speenhamland* roads towards *Bradfield*, and containing in length four furlongs, twenty-nine poles, and three yards, or thereabouts, and so much of the said old turnpike road as lay between the point at which the same road touched the said before-mentioned road leading towards *Bradfield*, and the point at which the said old turnpike road touches the road leading by the parish church of *Englefield*, towards *Theale*, and containing in length three furlongs and ten poles, or thereabouts, and also so much of the said old turnpike road as lay between the point at which the same road touched the road leading from the parish church of *Englefield*, towards *North Street*, and the point at which the new line of turnpike road crossed the said old turnpike road, and containing in length seven furlongs and

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six poles, or thereabouts, should be stopped up, and wholly discontinued to be used as a highway, and that the several pieces of old turnpike road so ordered to be stopped up, should be given up to the plaintiff, the owner of the adjoining lands, pursuant to the agreement of the same date between them. By this agreement, after reciting the above order, the trustees agreed to give up to the plaintiff so much of the old road as was ordered to be stopped up in exchange for his lands occupied by the new line of road. Possession of the old road was afterwards given to the plaintiff by the trustees. The distance from the south end of *Bostock Lane* to *Hogmoor Coppice*, was thirty-six poles less by the new than the old road. The distance from the defendant *Welch's* house at *Englefield*, to *Till Mill*, at which the inhabitants of *Englefield* had been accustomed to grind their corn, was considerably increased by the stoppage of the old road. The distance, also, of the village of *Englefield* itself from the *Bath* road was increased by the stoppage; and the distance from the houses of several parishioners of *Englefield* to the parish church was also rendered considerably greater. On the 10th *March* 1826, the alleged trespasses were committed, in order to assert a continuing right of way over the locus in quo.

Tyrwhitt for the plaintiff. The trustees had such a general jurisdiction over the subject-matter as authorised them to make the order. By the 3 G. 4. c. 126. s. 83.(a),
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(a) The 3 G. 4. c. 126. s. 83. enacts, " That it shall be lawful for the trustees or commissioners of every turnpike road, and they are thereby fully authorised and empowered, from time to time, to make, divert, shorten,

the trustees of every turnpike road are empowered from time to time to divert, shorten, vary, *alter*, and improve the course of any road under their care. By section.

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shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management, or of any part or parts thereof, and to divert, shorten, vary, alter, and improve the course or path of any of the said several and respective roads, through or over any commons, or waste grounds, or uncultivated lands, without making satisfaction for the same; and also through or over any private lands, tenements, or hereditaments, tendering and making satisfaction to the owners thereof, and persons interested therein, for the damage they shall sustain thereby. "

Sect. 86. enacts, " That after any new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof, as in the judgment of the said trustees or commissioners may thereby become useless or unnecessary, [or] (a) *shall or may be stopped up and discontinued as public highways, (unless leading over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town or place, lands or tenements, to which such new road or roads doth not or do not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals,) and shall be vested in, and shall and may be sold and conveyed by the said trustees or commissioners in the manner herein mentioned, for the best price that can be gotten for the same; and the money arising by such sale shall be applied for the purposes of the act, for repairing and maintaining such turnpike road.*"

Sect. 88. enacts, " That when any turnpike road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be subject to the said provisions and regulations in any act of parliament contained, or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or persons whose lands adjoin thereto, as hereinafter mentioned, with regard to pieces of ground not wanted; but if such old road shall lead to any lands, house, or place, which cannot, in the opinion of the said trustees or commissioners, be conveniently accommodated with a passage from such new road, which they are hereby authorised to order and lay out if they find it necessary, then, and in such case, the old road shall be sold, but subject to the right

(a) *Sic* in the statute, apparently interpolated by mistake.

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section 84. they are empowered to treat for the purchase of lands necessary for diverting, altering, and improving any such road. By section 86. after a new road is completed, the old one may be stopped up and discontinued as a public highway, except in certain cases therein mentioned. And the first question is, whether the exception absolutely ousted the trustees of their general power to stop up roads in the particular cases there specified, of a road to a church, mill, &c. That section provides, "that after such new road shall be completed, the lands constituting any former roads, &c. or such part thereof, as in the *judgment* of the trustees may thereby become useless or unnecessary, shall or may be stopped up and discontinued as public highways (*unless* leading over some moor, heath, common, uncultivated land or waste ground, or to *some* church, mill, village, &c. to which such new road doth not immediately lead, and which *may therefore be deemed proper* to be kept open either as a public or private way

of way and passage to such lands, house, or place respectively, according to the ancient usage in that respect."

By 4 G. 4. c. 95. s. 87. it is enacted, "That if any person shall think himself aggrieved by any order, judgment, or determination made, or by any matter or thing done, by any justice or justices of the peace, or by any trustees or commissioners of any turnpike road, in pursuance of this act or the said recited act, or any local act, for making, repairing, or maintaining any turnpike road, (except where the order, judgment, or determination of any such justice or justices, trustees or commissioners, are hereby declared to be final and conclusive, and except under the particular circumstances hereinafter mentioned,) and for which no particular method of relief hath been already appointed, such person may appeal to the justices of the peace at the next general or quarter sessions of the peace to be held for the county, &c., wherein the cause of such complaint shall arise: provided always, that no appeal shall be allowed against any conviction for any penalty or forfeiture which shall not exceed the sum of forty shillings."

for

for the use of any inhabitant at large, or any individual"). This clause is not imperative on the trustees, or in restraint of their general power to stop a turnpike road on completing a new one, but is merely directory to them in the exercise of such power in the particular instances there enumerated. It will be contended, that the exception beginning with the word *unless* is absolute, and that as the new line of road does not lead *immediately* from the defendant's house to *Till Mill*, this case falls within it. But if such is the true construction of this clause, no part of any old turnpike road leading over any moor, &c. or to any mill, &c. could be stopped. For if such a road be turned, there must always be some place which stood on the old line, the communication from which, to some mill, village, place or lands, will not be *immediate* by the new line. The object of the exception was to indicate, that if the old road led not *towards* but *to* some church, mill, &c. to which the new road did not immediately lead, the trustees might stop up the old road under the act, and might at the same time, if they thought fit, reserve a right of way to any inhabitant, &c. Thus if trustees stopped up a road leading to a church, mill, &c., only, as to a cul de sac, they might yet reserve a communication over the old road, if the new line did not lead to such church, mill, &c., or if a new passage could not, in their opinion, be conveniently laid thereto from the new road, pursuant to the 3 G. 4. c. 126. s. 88. Then if the old line of road here stopped did not lead immediately *to*, but only *towards* some church, mill, &c., it is not such a road as falls within the exception, whatever be the effect of that exception; for *Wright v. Ratray* (a) shews that a claim

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(a) 1 East, 377.

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of a prescriptive right of way from *A.* to *C.* is not sustained by proof of a way leading from *A.* towards *C.*, but interrupted at *B.* Now the old road from the defendant's house to *Till Mill* was not immediate, but led to many other places. The new road is as immediate, though longer. The expressions in the exception, "and which may, therefore, be deemed proper to be kept open, either as a public or private way," shew a manifest analogy to the 88th section. That section is in part *material*, though applying only to cases where the old road is sold, and not exchanged as in s. 86i, and clearly vests a discretion in the trustees to sell the old road, subject to a right of passage thereon to any house, &c., which cannot, in their opinion, be conveniently accommodated with a passage from the new road. The trustees having a discretion vested in them by the act to turn this road, exercised it for the benefit of the public by making a shorter line, and followed the maxim "discretio est scire per legem quid sit justum" (a), consulting the parallel act respecting stopping highways not turnpike, viz. 55 G. 3. c. 68. s. 2., which enacts that highways may be diverted so as to make the same nearer or more commodious to the public. The statute 13 G. 3. c. 78. s. 19., repealed by the 55 G. 3. c. 68. s. 1., was to the same effect. Secondly, if the trustees, having a general jurisdiction to order the road to be stopped, exceeded it by selling or exchanging the old road without reserving to the defendant a right of passage to *Till Mill*, he should have appealed to the next sessions, according to the statute 4 G. 4. c. 95. s. 87. to quash the order. The words "may appeal" have always been construed to be

(a) *Knightley's case*, 10 Coke, 140 a. See *Rooke's case*, 5 Coke, 100 a.

compulsory on the party seeking a remedy, *Bonnell v. Beighton* (a), *Durrant v. Boys* (b). In *Davison v. Gill* (c) the order was defective on the face of it. *Welch v. Nash* (d) turned on an ex parte order of justices, to which no plan was annexed as required by the 13 G. 3. c. 78. s. 19.

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Talfourd for the defendants. The single question in this case is, Whether the trustees had jurisdiction under the statutes, to stop up the road which they have conveyed to the plaintiff? for if they had no jurisdiction, it can scarcely be contended that the parties aggrieved were bound to appeal to the sessions; and if they had jurisdiction, it must be conceded that this Court has no power to enquire into the manner in which they have exercised a discretion confided to them by law. The case has been argued, as if the only objection which could be raised to the stoppage was, the individual grievances of the defendant *Welch*, in the increase of distance to the mill where he and the other inhabitants of *Englefield* were accustomed to grind their corn; but this is not so, for the old road led to the village and parish church of *Englefield*, and to two closes not belonging to the plaintiff, to which there is now no access; and if in consequence of these circumstances the trustees had no power to stop up the old road, it remains a public highway, along which any of his Majesty's subjects have still a right to travel. The exception in 3 G. 4. c. 126. s. 86. includes a road thus circumstanced, for having given to the trustees a discretion to stop up roads generally, when they shall deem it fitting, it proceeds to qualify that discretion by the words, "unless

(a) 5 T. R. 182.

(b) 6 T. R. 580.

(c) 1 East, 64.

(d) 3 East, 594.

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leading over some moor, &c. or to some church, mill, village, town, or place, lands or tenements, to which such new road does not immediately lead" and here the case expressly finds that the old road led to the village of *Englefield*. It is obvious that, however indifferent or beneficial to the public at large the alteration may be, it has been productive of great prejudice to all the inhabitants of the village of *Englefield*, whose houses are now to be reached only by circuitous roads, and this was the precise evil against which the exception was intended to guard. It is to be observed, that the statute 3 G. 4. c. 126. gave no appeal whatever; and, therefore, under the construction contended for, there was no remedy against the judgment of the commissioners, even if they took away the only road which an individual might have to his own premises, as they have done in the instance of the closes which are described in the case as excepted from the lands of the plaintiff on each side of the old road. The discretion, therefore, of the trustees was limited, that limitation extended to the locus in quo, and consequently the right of the public was not extinguished, and the defendants are entitled to judgment.

Cur. non vult.

BAYLEY J. This was an action of trespass, to which there was a plea of a public right of way. The locus in quo at one time had been part of a public highway. The question was, If it had or had not been properly stopped up, so as to destroy the right of the public, and so as to vest the right of possession in the plaintiff? The case turned on the construction of the 2 G. 4. c. 126. s. 86. It was insisted that the trustees had no rights to make the order for stopping up the road in question, because

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because the old road led to a church, mill, village, &c. to which the new road did not immediately lead. Section 86. provides, 'that after such new road shall be completed, "the lands or grounds constituting any former road, or so much and such part thereof as in the judgment of the trustees may thereby become useless or unnecessary, shall or may be stopped up and discontinued as public highways, (unless leading over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town, or place, lands or tenements, to which such new road or roads doth not, or do not immediately lead, and which may therefore be deemed proper to be kept open either as a public or private way or ways, for the use of any inhabitant at large or any individual or individuals.") The whole question turns on this exception. If it takes away from the commissioners the power to stop up every road of the description there specified, then they had no jurisdiction to stop up the road in question. But if it does not take away from them the power, but only authorizes them to leave open roads of that description when in their discretion they shall think fit, then the order in question will be a valid order. Undoubtedly the trustees would have had no jurisdiction to stop up the road in question if the early part of the excepting clause had stood by itself. But upon a careful consideration of the whole of this clause, it seems to me to be clear that the legislature intended to give the commissioners a discretionary power either to stop up or leave open those roads as they might think fit. The clause contains two branches; the first points out the description of the roads to which the power of the trustees may be applied; the second leaves it to the discretion of the trustees to apply it or not; and it even gives them a remarkable power of converting that

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which had previously been a public into a private way. If the first branch of the exception had stood by itself, it would take away from the commissioners all power of stopping up any road leading over a moor, heath, &c. or to a mill, church, &c. It would be singular, however, that the commissioners should be precluded from stopping up any old road leading over a moor, heath, &c., when the new road might perhaps open in a new direction over that very moor, heath, &c., and the termini might be the same, though the line of direction might be somewhat different from the old road. It would be singular, too, that they should be precluded from stopping up an old road leading to a church, mill, &c. in every case where the new road did not lead immediately to such church or mill, though it might lead to some other road which would perhaps give a good access to the church, mill, &c. It seems to me that the latter words of the clause were introduced to qualify the more general expressions used in the former sentence, and to point out to the trustees in what instances that power might be exercised, but leaving it to their discretion to exercise it or not as they might think proper. This is the only reasonable construction of the clause. The clause says, first, that the road shall be stopped up, unless it is a road of a particular description; and, secondly, unless it be a road which, on account of its leading to that heath, moor, &c., or to that mill, church, &c. *may be deemed proper* to be kept open as a public or a private way. The latter words import that a discretion is to be exercised. To be exercised by whom? Clearly by the trustees and commissioners. If we were to hold that it was only to be exercised by a judge or jury, it would lead to great litigation, for different juries might form very different judgments

as to the propriety of continuing the road open. Besides, the old road or roads are to be kept open, either as a public or private way or ways. If it be deemed proper that an old public way shall be a private way, the public rights are at an end; and it will become a way to be used only by particular individuals. But unless the commissioners have this power of making it a private way, how can it become such by law? There is no legal mode of converting that which has been a public way into a private way, except by act of parliament. It seems to me, therefore, that there is an obligation on the commissioners, when they are dealing with a road of this description, if they in their judgment shall think fit that it shall continue a public road, to say so in express terms on the face of their order. The true construction of this clause is, that the road is to be stopped up, unless, first, it is a road of one of the descriptions specified in the act; and, secondly, unless the trustees deem it proper to be kept open as a public or private road. In this case the commissioners have made an order for stopping up and discontinuing, but have made no provision for keeping it up, either as a public or a private road; and, as it seems to me, the consequence is, that it has ceased to be a public road, and that the justification, therefore, is not made out. The statute 3 G. 4. c. 126. gives no appeal, and, therefore, under that statute the judgment of the trustees or commissioners (if they were the persons to exercise a judgment on the subject) would be final and conclusive. But that defect, if it be one, is remedied by the stat. 4 G. 4. c. 95. s. 87. For these reasons, it appears to me that the locus in quo had ceased to be a public way; and that, as the right of possession and right of property were vested in the plaintiff, he is entitled to recover.

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HOLROYD J. concurred.

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LITLEDALE J. The words of the exception manifestly import that a discretion is to be exercised by the commissioners. First, the word "*may*" *prima facie* has that import. It is true, that in some acts of parliament (as in the 8 & 9 W. 3. c. 11. s. 8.) the word "*may*" has been held to mean "*must*," but if the word "*must*" had accompanied the words "*be deemed proper*" in this case, the whole passage would have been insensible. The word "*must*" is wholly inapplicable to that act of the mind which the trustees by the other words are called upon to put in operation. The word "*may*" cannot in this case, therefore, mean "*must*." The word *deemed* imports also that a judgment is to be exercised, and the words "either public or private ways" describe the subject matter on which that judgment is to be exercised.

Judgment for the plaintiff.

ARTWOOD and Others *against* MUNNINGS.

A. B., who carried on business on his own account, and also in partnership, went abroad, and

ASSUMPSIT by the plaintiffs, as indorsees, against the defendant, as acceptor of a bill of exchange for 1560*l.* Plea, the general issue. At the trial before Lord

gave to certain persons in this country two powers of attorney; by the first of which, authority was given for him, and in his name, and to his use, to do certain specific acts, (and amongst others, to indorse bills, &c.) and generally to act for him, as he might do if he were present; and by the second, authority was given "for him and on his behalf, to accept bills drawn on him by his agents or correspondents." *C. D.*, one of *A. B.*'s partners (and who acted as his agent), in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in *A. B.*'s name by *procuration*. In an action against *A. B.* by the indorsee of the bill: Held, first, that the rights of the indorsee depended upon the authority given to the attorney; secondly, that the powers applied only to *A. B.*'s individual and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that *C. D.* did not draw the bill in question as agent, but as partner; and, lastly, that the general words in the powers of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given.

Tenterden

Tenterden C. J., at the *London* sittings after *Michaelmas* term 1823, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:—

The plaintiffs were bankers carrying on business in the city of *London*; the defendant was a merchant engaged in extensive mercantile business, and also in joint speculations to a considerable amount, with *Thomas Burleigh*, Messrs. *Bridges* and *Elmer*, *S. Hewlett*, and *W. Rothery*. In the year 1816 the defendant went abroad on the partnership business, and remained abroad till after the bill upon which this action was brought became due. By a power of attorney, dated the 18th of *May* 1816, the defendant granted power to *W. Rothery*, *T. Burleigh*, and *S. Munnings*, his wife, jointly and severally for him, and in his name, and to his use, to sue for and get in monies and goods, to take proceedings, and bring actions, to enforce payment of monies due, to defend actions, settle accounts, submit disputes to arbitration, sign receipts for money, accept compositions; “indorse, negotiate, and discount, or acquit and discharge the bills of exchange, promissory notes, or other negotiable securities which were or should be payable to him, and should need and require his indorsement;” to sell his ships, execute bills of sale, hire on freight, effect insurances; “buy, sell, barter, exchange, export and import all goods, wares, and merchandises, and to trade in and deal in the same, in such manner as should be deemed most for his interest; and generally for him and in his name, place, and stead, and as his act and deed, or otherwise, but to his use, to make, do, execute, transact, perform, and accomplish all and singular such further and other acts, deeds, matters, and things as should be requisite, expedient, and advisable to be done in and about the premises, and all other his affairs and

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concerns, and as he might or could do if personally acting therein." By another power of attorney, dated the 28d of July 1817, and executed by the defendant when abroad, he gave to his wife, *S. Munnings*, power to do a variety of acts affecting his real and personal property; "and also for him and on his behalf, to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require, &c.; and generally to do, negotiate, and transact the affairs and business of him, defendant, during his absence, as fully and effectually as if he were present and acting therein." *T. Burleigh* corresponded with the defendant; and acted as his agent, both before and after the receipt of this power. The defendant, while abroad, employed part of the produce of the joint speculations in his individual concerns, and during his absence, *T. Burleigh*, for the purpose of raising money to pay to creditors of the joint concern, who were become urgent, drew four bills of exchange for 500*l.* each upon the defendant, dated *May* 22d, 1819. The proceeds of those bills were applied in payment of partnership debts; they were accepted by the defendant by procuration of *S. M.*, his wife. The bill in question was afterwards, in order to raise money to take up those bills, drawn and accepted in the following form:—"Six months after date pay to my order 1560*l.* for value received: *T. Burleigh*. Accepted per procuration of *G. G. H. Munnings*.—*S. Munnings*." This bill was discounted by the plaintiffs. The defendant returned to *England* in *October* 1821, and he, and each of the partners to the joint speculations, claimed to be a creditor on that concern.

Parke for the plaintiffs. The question is, Whether,
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under either of the powers of attorney, the defendant's wife was authorized to accept bills drawn by *Thomas Butleigh*, to raise money to discharge debts owing by the partners in the joint concern? By the second power express authority was given to Mrs. M. to accept bills drawn by agents of the defendant as occasion might require. *Butleigh*, the drawer, is found to have acted as agent of the defendant, and, therefore, the only circumstance necessary to complete the authority is to show that occasion did require that the bill should be drawn. That, however, cannot affect third persons. They are bound to see the power to accept, but not to ascertain how far the bill was necessary. Powers are often construed differently as to the attorney and third persons. In *Howard v. Baillie* (a), *Eyre C. J.* puts an instance, viz. a power to pay debts in course of administration; payment of a simple contract before a specialty debt would be good against the creditor, but not as to the attorney. It is not possible for strangers to have such a knowledge of the party's affairs as to be enabled to judge whether the occasion did make the bill requisite. The agent, of course, has such knowledge; and the power as to this part must be considered directory only. The party is protected by having the choice of his own agent, and may derive great benefit from giving him power to draw, or accept bills in cases of expediency as well as in cases of absolute necessity. The power in question may fairly be read, as if the words "at the discretion of my attorney," or "as my attorney shall think fit," had been inserted, instead of "as occasion shall require." If the words had been "as shall be necessary," a different construction might have prevailed. The case of *The East India Company v. Hens-*

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 App' Woods
 against
 Maxwells.

(a) 2 H. Bl. 618.

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Lev (a), differs from the present. There the agent had a special and limited power to buy silk of a particular quality. If the order to him had been general, to purchase such silk as occasion should require, and he had bought silk of a second quality, although the occasion required him to buy it of the first, the principal would have been bound by his act. But, secondly, the occasion did require this bill to be accepted. The case states that the defendant was engaged in various speculations individually and in partnership. He had applied to his own use funds of the joint firm. The joint concern was in debt, and the bill in question was drawn and accepted for the purpose of paying those debts. [*Bayley J.* There is nothing said in the power as to partnership concerns, and as to them it was unnecessary, for the other partners had, without any power of this sort, authority to bind the defendant.] The words of the power are general; there is nothing in them to limit the authority to the private concerns of the defendant, and the words must be construed most strongly against him. But if it be held that the special authority to accept bills did not extend to this case, still the general power in the first instrument was sufficient to authorize the acceptance: that relates to the management of *all* the defendant's affairs; and if any words are sufficiently comprehensive to give both special and general powers, they have been used in that instrument,

Pollock contra. If the first power had been capable of receiving the construction now attempted to be put upon it, the second would have been wholly unnecessary; but it manifestly was not intended to apply to the acceptance of bills. The question, therefore, turns upon

the authority to accept given by the second power. Much argument has been addressed to the question how far this power was restricted by the introduction of the words "as occasion shall require." But supposing no such words to have been used, then the power would have been to accept bills drawn by his agent or correspondent, but that must mean an agent or correspondent in that transaction. Nor would any difficulty arise out of such a construction; for the acceptance being by procuration, ought to put parties taking the bill on their guard, and they should require the production of the letter of advice accompanying the bill.

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BARRY J. This was an action upon an acceptance importing to be by procuration, and, therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill, ought to exercise due caution, for he must take it upon the credit of the party who assumed the authority to accept, and it would be only reasonable prudence to require the production of that authority. The plaintiff in this case relies on the authority given by two powers of attorney, which are instruments to be construed strictly. By the first of the powers in question the defendant gave to certain persons authority to do certain acts *for him, and in his name, and to his use.* It is rather a power to take than to bind; and, looking at the whole of the instrument, although general words are used, it only authorizes acts to be done for the defendant singly; it contains no express power to accept bills, nor does there appear to have been an intention to give it; the first power, therefore, did not warrant this acceptance. The second power

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power gave an express authority to accept bills *for the defendant, and on his behalf*. No such power was requisite as to partnership transactions, for the other partners might bind the firm by their acceptance. The words, therefore, must be confined to that which is their obvious meaning, viz. an authority to accept in those cases where it was right for him to accept in his individual capacity. Besides, the bills to be accepted are those drawn by the defendant's agents or correspondents; but the drawer of the bill in question was not his agent *quoad hoc*. The bills are to be accepted, too, "as occasion shall require." It would be dangerous to hold that the plaintiff in this case was not bound to enquire into the propriety of accepting. He might easily have done so by calling for the letter of advice; and I think he was bound to do so. For these reasons, I am of opinion that judgment of nonsuit must be entered.

HOLROYD J. I agree in thinking that the powers in question did not authorize this acceptance. The word *procuration* gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given. The case does not state sufficient to shew that this bill was drawn by an agent in that capacity, but rather the contrary; for it appears that it was drawn to raise money for the joint concern in which the drawer was a partner; it does not, therefore, come within the special power. Then, as to the general powers. These instruments do not give general powers, speaking at large, but only where they are necessary to carry the purposes of the special powers into effect.

LITTLEDALE J. I am of the same opinion. It is said

said that third persons are not bound to enquire into the making of a bill; but that is not so where the acceptance appears to be by procuration. The question then turns upon the authority given. The first power of attorney contains an authority to indorse, but not to accept bills; the latter, therefore, seems to have been purposely omitted. Neither is this varied by the general words, for they cannot apply to any thing as to which limited powers are given. The second power gives authority "to accept for me and in my name, bills drawn or charged on me by my agents or correspondents, as occasion shall require." The latter words, as to the occasion, do not appear to me to vary the question; and, reading the sentence without them, it authorizes the acceptance of bills drawn by an agent. The present bill was not drawn by *Burleigh* in his character of agent, and therefore the acceptance was without sufficient authority, and the plaintiff cannot recover upon it.

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Atwood
against
Munnings.

Postea to the defendant.

WATSON *against* HOME.

COVENANT by the plaintiff, as assignee of the lessee, against the defendant, as lessor, to recover the amount of taxes and rates paid by the plaintiff in re-

By lease, lessor demised for a term of years a piece of ground at a fixed annual

rent. The tenant covenanted not to build on the land without the licence of the lessor. The lessor covenanted to pay all taxes already charged, or to be charged upon or in respect of the demised piece of ground during the continuance of the term. At the time when the lease was executed, the lessor gave a licence to the lessee to build on the land demised. The lessee did build, and thereby increased the annual value of the premises: Held, that the landlord was liable upon his covenant to pay the taxes in proportion to the rent reserved, and not to the improved value.

The tenant was bound for his taxes under the provisions of a local act, and in consequence of such composition, his premises were assessed at a less annual sum than the improved annual value: Held, that the tenant paid taxes in respect of the whole improved annual value, and that the landlord was to pay that proportion of the taxes paid which the rent bore to such improved annual value.

1. The plaintiff, who is the assignee of the lessee, is entitled to recover the amount of the taxes paid by him in respect

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vs.
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spect of a certain piece or parcel of ground by indenture of lease demised by the defendant to one *J. Prendergast* for a term of eighteen years and three quarters, and assigned by him to the plaintiff. Plea, that the defendant had paid all taxes and rates charged upon or in respect of the ground so demised as aforesaid. At the trial before *Littledale J.*, at the *Middlesex* sittings after *Michaelmas* term 1896, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case, as to the amount of damages:—

By indenture of lease, dated the 25th March 1878, between the defendant of the first part, the plaintiff of the second part, and *L. Prendergast* of the third part; the defendant demised to *Prendergast* all that piece or parcel of ground, situate, &c. (stating local situation and abutments.) Habendum for eighteen years and three quarters, from the 25th March then next, at the yearly rent of 79*l.* 12*s.* 6*d.*, which the lessee covenanted to pay without any deduction whatsoever, except for taxes, charges, rates, and assessments charged or to be charged upon, for, or in respect of the said piece or parcel of ground, and paid for by *Prendergast* or his assigns; and then the lessee covenanted that he would not, without the previous consent in writing of the defendant, erect or suffer to be erected, any messuage, or tenement, or other building upon the said demised premises. The defendant's covenant as to taxes, upon which this action was brought, was as follows: "And also, that he, the said *W. Homes*, his executors, &c., shall and will bear, pay, and discharge, as well the land-tax as all other taxes, charges, rates, assessments, and impositions, parliamentary, parochial, or otherwise, already charged or

to

to be changed upon or in respect of the said demised piece or parcel of ground, or any part thereof, during the continuance of the said term hereby granted, or any renewed term or terms to be granted, or upon the said *L. Prendergast*, his executors, administrators, or assigns in respect thereof." The defendant at the time of executing the lease on the said 9th day of *March* 1819, signed a licence or consent for the plaintiff to build on the demised ground. Fourteen messuages were afterwards built thereon at an expence of upwards of 2500*l.*, and to each of the messuages was attached a garden, being respectively parts of the demised ground. The whole of these houses let at rents amounting together to 584*l.*, subject to the risk of tenants' taxes, repairs, and all outgoings, which were paid by the plaintiff. In 1819 the lease was duly assigned to the plaintiff. At the time of the execution of the lease the defendant was assessed for the whole land, about fifteen acres, including three messuages, at a valuation of 200*l.* per annum, and after he had let off the part to *Prendergast*, his rate was reduced to 180*l.*, deducting 20*l.* for the portion let off, it having been customary in the parish to assess land unbuilt upon at 5*l.* per acre per annum. The plaintiff claimed in respect of the following parochial rates which he paid from *Christmas* 1821 to *Michaelmas* 1824, amounting to 152*l.* 15*s.* 6*d.* for two years and three quarters, viz. the poor and church-yard rates, the paving and watch rates, and the sewer's rate. By the local acts of 22 *G. 2. c. 50.* and 42 *G. 3. c. 15.* the watch and paving rates are charged upon the occupiers of any messuage, &c. And by a local act of the 52 *G. 3. c. 112. s. 45.* the poor and church-yard rate are also charged upon the inhabitants and occupiers; but by section 54 of the last act, the trustees under the last-mentioned

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 WARDEN
 of the
 House.

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against
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mentioned act, and the trustees under the former-mentioned paving acts, are empowered jointly to compound for all the above rates with landlords, when the premises shall not exceed 18*l.* per annum, or where the houses are let in lodgings. The sewer's rate is assessed by virtue of the 54 G. 3. c. 219., and is directed to be charged upon the occupier, and allowed by the landlord. Immediately after the fourteen houses were completed, and the gardens fenced in, *Prendergast* the lessee, and afterwards the plaintiff as assignee, under the 58 G. 3. c. 112. s. 54. entered into a composition for payment of the poor and other parochial rates and assessments on the houses and gardens, and the same were compounded for at an average of 12*l.* for each of the houses and gardens, making an aggregate sum for the whole of 168*l.* per annum. The plaintiff proved that he had paid the taxes and rates in respect of the said houses and gardens from Christmas 1821 to Michaelmas 1824, amounting to 152*l.* 15*s.* 6*d.*, being two years and three quarters upon the said sum of 168*l.* so compounded for, and he claimed to recover the proportion of the said sum of 152*l.* 15*s.* 6*d.*, calculated upon the sum of 79*l.* 12*s.* 6*d.*, the rent reserved by the lease to, and received by the defendant for the demised premises: by which calculation, as 168*l.* had to bear 152*l.* 15*s.* 6*d.*, so 79*l.* 12*s.* 6*d.* ought to bear 72*l.* 7*s.*

Chitty for the plaintiff. The defendant expressly covenants to pay all taxes charged or to be charged upon or in respect of the demised piece or parcel of ground during the continuance of the term. In *Hylde v. Hill* (a), there was no express covenant by the lessor

(a) 3 T. R. 377.

is payable, but the covenant was by the lessee to pay all taxes except the land tax. *Graham v. Wade* (a) turned on the construction of a deed couched in very special terms, and does not apply to the present case. Besides, it is evident, that at the time when the lease was executed both the parties contemplated that the premises were to be built upon, for the licence to build was signed on the very day the lease was executed.

Observe contr. If the covenant were construed literally it might follow, that in consequence of the tenant's improvements the taxes might exceed the whole rent payable to the landlord, and in that case he would not receive any compensation for the use of his land. This could not have been the intention of the lessor. The covenant, therefore, must receive a reasonable construction to effectuate the intention of the parties, and giving to that construction, it binds the lessor to pay all taxes charged or to be charged upon the piece or parcel of ground demised, being of the annual value of ~~not exceeding~~. See *Yeo v. Leman* (b), and *Hyde v. Hill* (c), but authorities to show, that under such a covenant as this the landlord is liable to pay taxes in proportion, not to the decreased rate of taxation, but in proportion to the rent he receives. In the latter case the covenant was contained in a building lease.

The question turns entirely upon the construction of the clause in the lease by which the lessee covenants to pay and discharge, as well the land as all other rates, charges, rates, and assessments,

(a) 25 B. R. 20.

(b) 2 Str. 1150.

(c) 5 T. R. 577.

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against
Horn.

parochial, parliamentary, or otherwise, already charged, or to be charged upon or in respect of the said demised piece or parcel of ground, or any part thereof, during the continuance of the term. The annual rent reserved was 79*l.* 12*s.* 6*d.*, and there was a covenant, by the lessee, not to build upon the demised premises without the consent of the lessor. If the land had not been built upon, but had remained in the same state as when the lease was executed, it is quite clear that the lessor would be liable to pay such taxes only as would have been payable in respect of property of the annual value of 79*l.* 12*s.* 6*d.*. By the lease the parties have agreed that that sum should be taken as the annual value of the premises. It is the annual sum which the property yields to the lessor, and in respect of which he would have been liable to be assessed to the land tax and poor rates if they had been payable by him; but the lessee afterwards built upon the land, and thereby increased its value. The question is, whether the lessor is bound to contribute to the tenant's taxes in proportion to the rent reserved, or in proportion to the increased rate at which the premises are now assessed by reason of the improvements made by the tenant. The covenant, in terms, is to pay all taxes charged or to be charged upon the demised piece or parcel of ground during the continuance of the term; but that covenant must receive a reasonable construction. If it were literally construed, so as to make the landlord liable for all taxes charged in respect of the improved value, it might possibly happen, in consequence of the improved value of the premises and the increased rate of taxation, that the landlord would have nothing to receive for the use of his land. Now that could not have

have been the attention of the lessor. As soon as the lease was executed the property might have been assessed at the annual value of 79*l*. 12*s*. 6*d*.; and when improvements were made, and greater rates consequently imposed, the increased burden ought in justice to fall upon that person who enjoys the benefit of the improvements. It seems to me, therefore, that when those improvements were made and the premises assessed in respect of their improved value, the tenant was entitled to deduct from the rent not the whole rates charged, but that proportion of the taxes which would have been payable in respect of the original value of the premises. *Yeo v. Leman* (a), and *Hyde v. Hill* (b), proceeded on the principle that the landlord is to be charged in proportion to his rent, and not to the improved value. It seems to me that the landlord in this case ought to be charged that proportion of the taxes paid by the tenant, which would have been payable in respect of the premises, if they had continued to be of the original value of 79*l*. 12*s*. 6*d*. And, although the tenant has compounded to pay rates as if his premises were assessed at 108*l*.; yet he has in fact paid in respect of the improved annual value 56*l*.; and the sum payable by the landlord must be calculated accordingly.

To borrow to do so.

HOLRODGE J. The assessments ought to be made on the land in proportion to its annual value. If these taxes, therefore, had been payable in the first instance, partly by the landlord and partly by the tenant, each of them must have been assessed in proportion to that annual value which the land produced to him; but by

jon blud (a) 3 Ann 1185.

(b) 5 T. R. 570.

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law these taxes are payable by the tenant. It seems to me that the effect of the covenant in this case is to make the landlord and tenant contribute respectively to the taxes, in proportion to the benefit which they receive from the land. The defendant in terms covenanted to pay all taxes charged or to be charged upon the demised piece or parcel of ground during the continuance of the term. The parties by the reddendum agreed that the annual value of that piece or parcel of ground should, during the continuance of the term, be of the annual value of 79*l.* 12*s.* 6*d.* The covenant to pay taxes must, therefore, be construed with reference to that value. By this construction each party will contribute to the taxes in proportion to the benefit which he receives from the land. The lessor will pay taxes upon the original value, and the tenant upon the improved value, of which he alone reaps the whole benefit. I think, therefore, that the landlord must pay that proportion of the taxes which would have been payable by the tenant if the premises had remained in their original state, and of the annual value of 79*l.* The improved value is 584*l.*; and although the tenant has compounded under the act of parliament, and pays only an annual value of 168*l.*, still he pays taxes in respect of the full improved value. The landlord must, therefore, pay a share of the taxes in the proportion of 79*l.* to 584*l.*

LITTLEDALE J. concurred.

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HAYNES *against* HAYTON, Esq.

ASSUMPSIT against the defendant, late sheriff of Herefordshire. The declaration contained the common money counts. On the trial of the cause before *Bosanquet* Serjt., at the Spring assizes for the county of *Hereford* 1827, the following appeared to be the facts of the case:—

The plaintiff had, in *May* 1824, entered into two recognizances in 40*l.* each, one conditioned for his own appearance, and the other for that of his wife, at the then next quarter sessions for that county, to plead to an indictment found against them and three others for a forcible entry. These recognizances were returned to the clerk of the peace, and were estreated at the sessions, the plaintiff and his wife making default of appearance. The forfeited recognizances were included in the copy of the estreat roll sent to the defendant, as sheriff, with the writ, according to the provisions of the 3 *G. 4. c. 46. s. 2.*, and on the 30th of *August* following one of the defendant's officers proceeded to levy under the writ on the plaintiff's goods for the sum of 80*l.*, being the amount of his forfeited recognizances; *which sum the plaintiff immediately paid, in order to prevent a sale.* At the *Michaelmas* sessions following, to which the defendant had returned the writ and the estreat roll, with the word "Received" written in the margin against the plaintiff's recognizances, an application was

By the statute 3 *G. 4. c. 46.* the court of quarter sessions are empowered to discharge a forfeited recognizance in those cases only where the party has been committed to gaol, or has given security to appear at the sessions, and, therefore, where a party, whose recognizance had become forfeited for not appearing to an indictment, and against whom process had issued, paid to the sheriff the sum mentioned in the recognizance, in order to prevent a sale of his goods, and the justices at sessions afterwards by an order mitigated the recognizance to a small sum, and directed the sheriff to discharge the residue from the recognizance; it was held, that such order was void, and that the

party was not entitled to recover from the sheriff the sum which the justices had ordered to be discharged.

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 against
 Hayton.

made to the Court, under the sixth section of the before-mentioned act, to discharge the plaintiff from the money so paid in satisfaction of the forfeited recognizances; and the justices made an order to mitigate each of the forfeited recognizances to 13s. 4d., and also an order in each case on the defendant, as sheriff, in the form given in the act, schedule (C), to discharge the sum of 39l. 6s. 8d. (the residue of the forfeited recognizance) from the estreat roll. In the accounts rendered by the under-sheriff to the Court of Exchequer, 13s. 4d. was the sum stated to have been levied on each recognizance, and the residue discharged by order of sessions. Applications were made on the part of the plaintiff to the defendant's under-sheriff (after the order of sessions) requiring him to pay back to the plaintiff the two sums of 39l. 6s. 8d. and 39l. 6s. 8d., which he promised to do on being allowed sheriff's poundage, and receiving separate receipts for the two sums. The present action was brought to recover the full amount of the two sums remitted by the sessions. The jury found a verdict for the plaintiff for 74l. 13s. 4d. *Taunton*, in *Easter* term last, obtained a rule nisi for a new trial, on the ground that the legislature, by the statute 3 G. 4. c. 46., had given no power to the sessions to discharge a forfeited recognizance in a case where the party thought fit to pay the money, but only where he had been committed to gaol or become bound to appear at the sessions.

Maule and Whitcombe now shewed cause. Supposing that the sessions had no power to remit the forfeited recognizances, still the acts and admissions of the defendant's under-sheriff would entitle the plaintiff to recover on either of the counts for money had and received,

received, or on the account stated. He has expressly promised to pay the amount remitted by the sessions, deducting only his poundage, which was all he originally claimed to be entitled to hold; and although it was maintained that he could make no such claim on money levied by process issuing from sessions, yet on the trial it was conceded for the sake of peace. The sum, therefore, for which the verdict now stands, is that which he expressly promised the plaintiff to pay over to him. The account rendered by him to the Court of Exchequer, whereby he takes credit for the sums ordered by the sessions to be remitted, is a recognition and adoption by the sheriff of that order, and an acknowledgment that he holds the money to the plaintiff's use. It is unnecessary, however, to urge this view of the case, because the plaintiff's right to recover is well founded on the order made by the sessions; and that order was one which they had full authority to make, under the 3 G. 4. c. 46 (a). That is an act which should receive a liberal construction for the relief of parties, and not such an one as would enable the sessions to order the discharge of recognizances, only where a party has been lodged in gaol, or has given security, but would preclude them from making such an order, where the party has paid the whole sum forfeited. The writ directed by the statute, s. 2, and schedule (A), is a *fiat facias* and *capias*: it commands the sheriff to levy on the goods, &c.; and if there are no goods, &c. then to take the person. The sessions, in the latter case, have authority to "inquire into the circumstances," (s. 6.) and order the discharge of the whole or part

(a) This clause of the act seems in the judgment delivered by the Court had no effect.

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of the forfeited recognizance; and it clearly was not the intention of the legislature to exclude them from such inquiry and order, where the party has goods, and pays the full amount of the forfeiture. Such a payment may be considered as the party's binding himself to appear, and then when he does appear the sessions have full power. But it is not necessary, in order to invest them with that power, that security should be given either expressly or by implication. The sixth section gives them a discretionary jurisdiction over the subject-matter. The court of quarter sessions is thereby empowered, "at its own discretion, to order the discharge of the whole or part of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof." The latter clause has no meaning if such a case as the present is not within its operation. It is also to be observed that the order by the sessions to the sheriff, to discharge the forfeiture from the estreat roll, prescribed by the statute, schedule (C), does not recite either that the party had been taken into custody or that he had given security to appear and abide the decision of the Court, but merely, that he has appeared and has made it appear to the satisfaction of the justices that he should be relieved.

Taunton, contra. The legislature has given no power to the sessions to interfere where a party has thought fit to pay the whole money on the writ, coming in. If he chooses to abide the decision whether the whole or part of his forfeited recognizance should not be remitted, he may do so on giving security under section 5. And by the sixth section, by which alone the sessions acquire power to order a discharge, they may, by

the express terms of that section, make such an order not only where security has been given, but where the party has been committed to gaol. But their power is confined to those two cases. The authority by section 6. "to inquire into the circumstances of the case" is given to "the court of general or quarter sessions before whom any person so committed to gaol or bound to appear shall be brought." The words "committed to gaol" refer to persons taken into custody under section 2., and the words "bound to appear" refer to the security mentioned in section 5. The plaintiff in this case was not brought out of gaol, or in pursuance of security for his appearance; his case, consequently, was not within the contemplation of the statute, and the sessions had no authority to interfere.

an *indiv.*

Curr. adv. vult.

vd *reling* on...

and **BARTER J.** It appears in this case that the recognizances were forfeited, that process issued, and that the plaintiff paid the money to the sheriff. The sessions afterwards, upon the application of the plaintiff, made an order to mitigate the forfeited recognizances to 13s. 4d.; and also made an order on the sheriff to discharge the two sums of 39l. 6s. 8d. from the estreat roll, in consequence of which he omitted those sums in his accounts delivered into the exchequer, and promised the plaintiff to repay him. It has been insisted that the plaintiff was entitled to recover, first, on the statute 3 G. 4. c. 16; secondly, on the ground of the under-sheriff's promise; and, thirdly, on the ground that the sheriff took credit with the exchequer for those sums. As to the latter ground, it appears to us that if the sessions had not authority to make the order in question, that order is wholly void, and the sheriff's omission to insert these

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these sums in his accounts delivered into the attachee does not alter the case, for he is still accountable there. And if that be so, there was no consideration for his promise to pay the plaintiff, and it becomes nudum pactum. The question depends upon this, whether the 3 G. 4. c. 46. s. 6. authorizes the sessions to discharge the recognizance in all cases, or in those times only where the party has been committed to goal or become bound in sureties to appear at the sessions. If a general jurisdiction be given to the sessions, then the plaintiff is right, otherwise he is wrong. It was admitted by the plaintiff's counsel that the sessions had no other jurisdiction than that given by the 3 G. 4. c. 46. By section 2. of that act it is enacted, that all fines, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them, shall be certified by the justices of the peace by or before whom such fines, forfeited recognizances, &c. shall be imposed, or forfeited, to the clerk of the peace of the county, &c. and that such clerk of the peace shall copy on a roll such fines, forfeited recognizances, &c., and send a copy of such roll, with a writ of distringas and capias, or fieri facias and capias, to the sheriff, which shall be the authority to such sheriff for proceeding to the immediate levying of such fines, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them, on the goods and chattels of such several persons, or for taking into custody the bodies of such persons in case sufficient goods and chattels shall not be found wheron distress can be made for recovery thereof. Then section 5, which is very inaccurately worded, provides, that if any person on whose goods and chattels such sheriff shall be authorized to levy any such forfeited recognizance or sum of money to be paid

paid in lieu or satisfaction thereof shall give security to the sheriff for his appearance at the next general or quarter sessions, there to abide the decision of the court, and also to pay such forfeited recognizance or sum of money, &c. together with all expenses as shall be ordered and adjudged by the Court, it shall be lawful for such sheriff to discharge such person, so giving such security, out of custody; provided also, that in case such party so giving such security shall not appear in pursuance of his undertaking, it shall be lawful to the Court to issue a writ of distringas and capias, or fieri facias and capias, against the surety or sureties of the person so bound as aforesaid. I think that clause does not extend to cases where the party pays the money, or where the sheriff levies on the goods, but is confined to cases where the sheriff has taken the body. Then comes section 8, under which alone the plaintiff had power to apply to the sessions, and they had jurisdiction; that section enacts, that the court of quarter sessions, before whom any person committed to gaol or banded to appear shall be brought, is authorized and required to inquire into the circumstances of the case, and shall, at its discretion, be empowered to order the discharge of the whole of the forfeited recognizance or sum of money paid, or to be paid in lieu or satisfaction thereof, or any part thereof, which order shall be a discharge to the sheriff, &c. on the passing of his accounts at the exchequer. The power given to the sessions to order the discharge of a forfeited recognizance is, therefore, confined to cases in which a party brought before the sessions has been committed to gaol or been banded to appear. If it had been intended to give the sessions a general discretion in all cases, it is impossible to suppose

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against
Havron

pose that this language would have been used. By the second section the plaintiff might be committed to gaol. By the fifth section he might be bound to appear at the next quarter sessions; but in this case the party was neither committed to gaol nor bound to appear at the next sessions. He paid the money. Therefore, it seems to us, that as the authority of the sessions was limited to those cases only, they had no power to make the order in question. The statute 4 G. 4. c. 37. s. 3. is a legislative exposition of the former statute. It enacts, "that where) a party subject to any fine, forfeited recognizance, &c. shall reside or shall have removed from or out of the jurisdiction of the sheriff in which such fine, &c. shall have been incurred, &c. it shall be lawful for such sheriff to issue his warrant, together with a copy of the writ, directed to the sheriff acting for the county or place in which such person shall then reside or be, or in which any goods or chattels shall be found, requiring such sheriff to execute such writ; and the said sheriff, &c., within thirty days after the receipt of the warrant, is required to return to the sheriff, from whom he shall have received the same, what he shall have done in the execution of such process, and whether the party shall have given good and sufficient security to appear at the ensuing general or quarter sessions to be held for the county from which the writ issued, and in case a levy shall have been made, to pay over all monies received in pursuance of the warrant to the sheriff from whom he shall have received the same." If the sheriff is to make that return, it shews that the party had no power to go to the sessions unless such security were given; and as the sessions have power to award costs under the fifth section of the 4 G. 4. c. 37. that power would be nugatory

nugatory unless the security were given. Upon the whole we are of opinion, that the sessions had no power over the recognizance. The rule for a new trial must therefore be made absolute.

Rule absolute.

WOODWARD against BOOTH.

CASE. The first count of the declaration was upon the custom of the realm as to innkeepers, and stated that defendant kept an inn at *Chester*, in the county of *Chester*, to wit, at *Ludlow*, in the county of *Salop*; that plaintiff put up there and delivered into defendant's care a trunk, which, through his negligence, was lost; second count stated, that defendant was proprietor of a coach for the conveyance of passengers and their luggage for hire from *Chester* aforesaid to *Shrewsbury*, that plaintiff became a passenger, and that by the carelessness of the defendant his luggage was lost; third count similar in substance; fourth count, that plaintiff delivered to defendant a trunk to be put into or upon a coach at *Chester* aforesaid, to wit, at *Ludlow* aforesaid, to be carried to *Shrewsbury*; that by defendant's carelessness it was lost. Plea, not guilty. At the trial before *Vaughan B.* at the last *Shrewsbury* assizes, it appeared that the plaintiff never went into the defendant's inn, the first count was therefore abandoned; as to the others, it was proved that the trunk was delivered at *Chester*, in the county of the city of *Chester*, and it was thereupon said, that the terminus from which the trunk was to be carried was misdescribed. The learned Judge thought the variance was fatal, and

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against
Hutton.

Where, in case the declaration stated that plaintiff delivered a trunk to the defendant, to be put into a coach at *Chester* in the county of *Chester*, to wit, at, &c., and safely carried to *Shrewsbury*, and that through defendant's negligence it was lost; and it appeared in evidence that the trunk was delivered to the defendant at the city of *Chester*, which is a county of itself, separate from the county of *Chester* at large, but within its ambit: Held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called *Chester*.

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1887.

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against
Breed.

consented the plaintiff. In *Ex parte* seems a rule to set aside the nonsuit was obtained; against which *Campbell and R. V. Richards* showed cause. Although the declaration is framed in case, yet it is founded upon a contract, and the action was substantially for non-performance of a contract. There was the contract proved as alleged. The first count was abandoned at the trial, that described the defendant as an innkeeper at *Obester*, in the county of *Chester*, and all the subsequent counts describe the terminus, a quib as *Obester aforesaid*, which must mean "*Chester*, in the county of *Chester*." But the only *Chester* to which the evidence applied was the city of *Chester*, in the county of the city of *Obester*; the contract, therefore, was not proved as laid; and this is precisely within the authority of *Thurley v. Cracklin* (a), where *Abbott C. J.* held, that both ends of the line upon which goods are to be carried must be accurately described. [*Halsford J.* Is not the present case very like that of *Frith v. Gray* (b), where the declaration was upon a contract to procure a booth "on *Barnet Common*, in the county of *Middlesex*," and it appeared that *Barnet Common* was in the county of *Hertford*, but the Court held the variance immaterial.] There the place was immaterial; here it is the very foundation of the action, and, therefore, the variance is fatal. *Pook v. Court* (c), 3 *Stark. on Evid.* 1874, and several cases to the same effect are collected in *120*

Taunton contra. This was not an action of contract, but was founded on a common-law duty imposed upon

(a) 2 *Stark. N. P. C.* 385. (b) 4 *T. R.* 561. note to *Drewry v. Twiss*.

(c) 4 *Taunt.* 700.

carriage, and according to the cases of *Brick v. Gray*, and *The Mercury and Irwell Navigation v. Douglas* (a), the variance in this case was immaterial. The gist of the action was the not carrying safely to *Strensbury* a trunk delivered to the defendant for that purpose; the place where it was delivered was immaterial. But it does not appear that there was any variance; for in the absence of any proof of two places being called *Chester*, "*Chester*, in the county of *Chester*," may fairly be considered as a description of *Chester*, in the county of the city of *Chester*. [Bayley J. The case of *Doe v. Salter* (b) comes very near that; for it was there held that *Farnham* was a sufficient description of *Farnham Royal*, there being no evidence of any other place being called *Farnham*.] In *Crooklin v. Tucker*, evidence was given of two places of the same name, one in the city of *London*, the other in *Middlesex*. Again, the city of *Chester*, although a county of itself, is within the ambit of the county at large, and, therefore, taking the declaration literally, there is no variance.

HOPE, 1801.

∴ BAYLEY J. The substance of the bargain in this case was to put the trunk upon the coach and carry it to *Strensbury*, the place whence it was to be carried was immaterial. If the trunk had been placed on the coach after it left *Chester*, and whilst on the road to *Strensbury*, that would have been a compliance with the duty cast upon the defendant. But as to the question of variance, I think that the county mentioned may be considered to be the county of the city of *Chester*, inasmuch as in common parlance when *Chester* is men-

1827.

WICKHAM
against
Brent.

(a) 2 East, 497.

(b) 15 East, 2.

tioned,

1827.

WOODWARD
against
BOOTH.

tioned, the city of *Chester*, in the county of the city, is understood to be meant; and no evidence was given of the existence of any other place called *Chester*, in the county at large. If the objection could not have been thus answered, I should have been disposed to go further, and hold that *Chester* might be described as in the county at large. There are several cases in which a trifling variance as to the name of a corporation or of a parish has been held immaterial, where it was not calculated to mislead. For these reasons, I am of opinion, that the nonsuit must be set aside, and a new trial granted.

HOLROYD and LITLEDALE Js. concurred.

Rule absolute.

DOE on the Demises of JAMES PRING and JAMES
ROBERTS against PEARSEY.

The presumption is, that waste land, which adjoins to a road, belongs to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor.

THIS was an ejectment brought to recover possession of a cottage and garden in the parish of *Tewkesbury*, *St. Mary Magdalen*, in the county of *Somerset*. Plea, not guilty. At the trial before *Burrough J.*, at the Spring assizes for the county of *Somerset*, 1827, it appeared that the cottage in question had been built by the defendant's father in 1804, on a slip of waste land (by the side of the turnpike road), adjoining to inclosed land, which was copyhold, belonging to *John Roberts*, one of the lessors of the plaintiff, and which at the time of serving the ejectment was in the occupation of his tenant *James Pring*. It appeared by the court rolls, that

that *Roberts* had been admitted to six acres of land lying in one close, called *Fullons*, and also to four acres in *Fullons*. There was no evidence to shew what number of acres the inclosed land contained. It was contended, that as the adjoining land belonged to *Roberts*, the prima facie presumption was that the waste between his land and the high road belonged also to him. On the other hand it was insisted, that that presumption only took effect where the owner of the adjoining lands was a freeholder. The learned Judge directed the jury to find for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

1837.

ROBERTS
 PET. DENT.
 PLAINE
 AGAINST
 PRABERT.

Ed. Pollard and *C. F. Williams* now shewed cause. It is a presumption of law, that uninclosed land on the side of a highway belongs to the owner of the inclosed land next adjoining. This presumption is founded on a supposition, that at some former period the owners of the land on each side of the road granted to the public a right of passage not only over the land on which the road is formed, but over the uninclosed waste whenever the road happened to be out of repair, *Steel v. Pritchett* (a); and this presumption applies to a case where a copyholder is the owner of the adjoining land. For a copyhold of inheritance must have existed from time immemorial, and if the road was made after the copyhold was granted, as it must be presumed to have been, it must have been taken out of the lands of the copyholder.

(a) 3 Stark. N. P. C. 403.

1827.

*But dem.
Faint
agreed
Plaint.*

Erstine and Carter contra. The declaration does not state a demise by the lord of the manor; and, therefore, if the title be in him, the plaintiff is not entitled to recover. The plaintiff, therefore, ought to have made out a title either in *Roberts* or *Pring*. *Pring* was *Roberts*'s tenant. But then the plaintiff proved that *Roberts* was customary tenant of a close called *Bulland*, adjoining the waste in question; and it was insisted that he being owner of the adjoining inclosed land the presumption was, that he was also owner of the waste adjoining the highway. That is true where the owner of the adjoining land is a freeholder, but where he is a copyholder the presumption is, that the waste belongs to the lord, and not to the copyhold tenant. For the lord must be presumed to have retained in his own hands all that he did not grant to his tenant. Here the plaintiff only shewed a grant from the lord of *Bulland*, comprising a specified number of acres.

DAVIES J. It is very desirable that there should be one certain and definite rule applicable to all cases of this description. Now it is a *prima facie* presumption, that waste land on the sides, and the soil to the middle, of a highway belongs to the owner of the adjoining freehold land. The rule is founded on a supposition, that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road. I think that rule applies not only to freehold but to copyhold lands also. There was no evidence to shew when the road was first made, but it was a turnpike road. If the road existed at the time when the copyhold was first granted, viz. from time immemorial,

1827.

Don dem.
Faint
against
Harris.

mainly the right of property in the road and the waste adjoining might in that case have remained in the lord. But if the road were taken out of the land after the copyhold was granted, then the presumption would be that the property in the road and the waste adjoining was in the copyholder. Now I think we ought not to presume that the road in question was made before the time of legal memory. The probability is, that it was made long since. And if the road was made within the time of legal memory, then the prima facie presumption is, that the waste land adjoining the road belonged to Roberts, the copyhold tenant of the land next adjoining, and not to the lord. The rule for entering a new writ must, therefore, be discharged.

His Honor said,

I am also of opinion that the verdict is right. I see no reason for confining the rule to cases where the person in possession of the adjoining land is a freeholder. It applies equally whether the party occupying the adjoining land be a freeholder, leaseholder, or copyholder. As to the property granted, a copyholder stands in the place of the lord, the leaseholder in the place of the lessor. It is very improbable that when a lease or grant is made of land near the highway, and there is between the highway and the land inclosed a small quantity of uninclosed land of little or no use to the lord, or lessor, that he should separate it from the rest, or reserve to himself such land. When a grant of land near to a road is made (even where it is inclosed and separated from the land adjoining) it appears to me that the prima facie presumption is, that the land on that side of the fence on which the road is, passes like with it. Generally speaking, where an inclosure is made, the party making it erects his bank and digs

1827.

DOE dem.
PRING
against
PEARSON.

his ditch on his own ground; on the outside of the bank. The land which constitutes the ditch in point of law is a part of the close, though it be on the outside of the bank. And if something further is done for his own convenience when that which constitutes the fence is dug out from his land, as, for instance, if a small portion of uninclosed land near a public or private way is left out of the inclosure to protect and secure the occupation of that part of the land which is inclosed that in point of law is a part of the close on which the inclosure is made. If any grant of such land, being copyhold, had been made before the inclosure, the subsequent grants would probably continue to be made in the same way, notwithstanding the inclosure, and all the land, both within and without the inclosure, would, therefore, pass by those grants. It seems to me, therefore, that the rule that waste land near a highway is to be presumed *prima facie* to belong to the owner of the inclosed land next adjoining, is not confined to a case where the owner of that land is a freeholder, but extends equally to cases where the owner is a leaseholder or a copyholder. In either case evidence may be given to rebut the *prima facie* presumption. But it is of considerable importance that the *prima facie* presumption should be constant and uniform, and not left to depend on a variety of particular circumstances, some of which may be beyond the time of actual memory, although not beyond the time of legal memory.

LITTLEDALE J. : I am entirely of the same opinion. If any act of ownership by the lord of the manor be proved, then there will be an end of any presumption; but where no such act of ownership is proved, and the presumption does arise that the waste belongs to the

owner

owner of the adjoining land. It is not very likely that the lord should exercise any acts of ownership on these small strips of land where there is little herbage for cattle to depasture upon, and where there are no trees growing. It is admitted that the presumption is in favour of the owner of the adjoining land where he is a freeholder, and I think very reasonably so. We do not know the origin of these rights. In all probability the rule that the presumption is to be in favour of the owner of the adjoining land has arisen from its being a matter of convenience to the owners of adjoining land, and to prevent disputes as to the precise boundaries of property. If the rule of presumption as to the right of ownership applies to every freeholder, I see no reason why it should not apply to a copyholder. Suppose the road were made through ancient copyhold land, the copyholder would have a right to have his copyhold renewed (if he was tenant in fee-simple) to the same extent as he had it before. If before the road was made his copyhold extended to the line which afterwards was the middle of the road, he would have a right to have his copyhold renewed in the same way as before. There is no reason, therefore, why the same presumption should not be made in his case as well as in that of a freeholder. The same rule will apply if the road be made through the waste of a manor. In that case if the lord of the manor intends to reserve his right to the uninclosed land near the road, he must take care to do it by exercising acts of ownership upon it. And if the lord of the manor make a conveyance in fee, and grant his freehold, the same rule will apply as in other cases. It would be extremely inconvenient if a different rule of presumption were to prevail according as the adjoining or adjoining land is

1827.

Don dem.
Pring
against
Prasey.

1827.

Dem.
Plaintiff
against
PEARSEY.

joining land is freehold, copyhold, or leasehold. If, according to the argument urged in this case, the presumption does not apply to copyholders, — for the same reason it will not apply to a leaseholder. For a copyholder stands in the same relation to the lord of the manor as a leaseholder does to a freeholder. It is convenient and reasonable that the presumption should be the same in the case of a copyholder as it is in that of a freeholder. This rule must, therefore, be discharged.

Rule discharged.

Shaw & Sons v. Pitt
1827. 10 B. 116.
BREWER and GREGORY, Assignees of PITTER,
against SPARROW.

The assignees of a bankrupt having once affirmed the acts of a person who wrongfully sold the property of the bankrupts, cannot afterwards treat him as a wrong-doer, and maintain trover.

THIS was an action of trover, brought by the plaintiffs as assignees of one *Pitter* a bankrupt, to recover certain goods of the bankrupt alleged to have been wrongfully converted by the defendant. This cause was referred to an arbitrator, who, by his award, stated the following facts: —

The commission was issued on the 21st of October 1825, upon the petition of the plaintiff *Brewer*. The act of bankruptcy was committed on the 28th of October 1825. The assignment to the plaintiffs, under the commission, was executed on the 31st of December 1825. The goods for which the action was brought consisted of the stock in trade, household furniture, and effects found upon the premises of the bankrupt, at *Cheltenham*, in *Gloucestershire*, where he had carried on business until the 2d of October 1825, on which day he absconded and

1827.

Brewer
against
Jackson

and left his dwelling-house and shop. On the 4th of October the defendant, who was a creditor of the bankrupt, after consulting with the plaintiff *Brewer*, went to *Cheltenham*, when he found the house and shop of the bankrupt shut up. Upon his arrival he took possession thereof, and also of the stock in trade, household furniture, and effects, and re-opened the shop and continued the business, assisted by his son and the apprentice of the bankrupt, by selling the stock in the same manner as had been done by the bankrupt; and he continued to do so until the 18th of *November* following, when he and his son quitted the premises, leaving the apprentice in possession. On the 15th of *November* a messenger, by virtue of a warrant issued by the commissioners under the commission, at the instance of the plaintiff *Brewer*, arrived at *Cheltenham* and took possession of the premises, the household furniture, and effects, and seized the stock in trade, which consisted partly of stock which had belonged to the bankrupt, and partly of stock which the defendant had purchased during the time he continued the business, and which had been mixed up and in part sold with the bankrupt's stock for the general benefit of the trade, and to enable the defendant to sell the bankrupt's stock more beneficially than he otherwise could have done. The goods purchased by the defendant amounted to 212*l.*, which he paid for out of the monies received by him in the sale of the general stock in trade. He kept a daily account of the sale and purchase of the stock bought and sold, of all monies received and paid, and of all incidental expenses during the time he continued in possession, and such account was a just and true account, and at the time of his quitting possession, he

1827.

BROWN
against
STARROW

left with the apprentice of the bankrupt, the balance of such account, amounting to 20*l.* 6*s.* 3*d.*; which sum the apprentice duly paid to the messenger, who duly paid and accounted for the same to the plaintiffs before the commencement of the action. On the 21st of January the defendant, being summoned before the commissioners, delivered a copy of the account so kept by him to the plaintiffs. The action was commenced on the 4th of April following. The defendant did not intermeddle with, or dispose of any part of the bankrupt's goods, chattels, or effects, except his stock in trade. The defendant acted in all things touching and concerning the taking possession, and selling and disposing of the stock in trade of the bankrupt, and purchasing other stock and conducting the business, and in all other matters relating to or concerning the subject-matter of the action, bonâ fide, and solely for the benefit of all the creditors of the bankrupt. (101)

The defendant was held to be liable to *Hutchinson* for the plaintiffs. The defendant, after the act of bankruptcy had been committed, sold the goods of the bankrupt without any authority from the plaintiffs, or either of them, after they had become assignees; he thereby was guilty of a wrongful conversion, and is liable in trover. The defendant, who was a partner in the bankrupt's business, was held to be liable in trover. *Bradick*, contra, was stopped by the Court. (102)

BAYLEY J. The defendant in the first instance was a wrong-doer, and the plaintiffs might have treated him as such, but it was competent to them in their character of assignees either to treat him as a wrong-doer and disaffirm his acts, or to affirm his acts and treat him as their

their agent; and if they have once affirmed his acts and treated him as their agent, they cannot afterwards treat him as a wrong-doer, nor can they affirm his acts in part, and disavow them as to the rest. I am of opinion that the plaintiffs, in their character of assignees in this case, have affirmed the acts done by the defendant with reference to the disposition of the goods of the bankrupt, for they have accepted from him the balance of the account. That balance consisted of a sum due to them after giving them credit for the produce of all the bankrupt's goods sold by the defendant. By accepting and retaining that balance without objection, after they had received a copy of the account kept by the defendant, they adopted his acts and recognized him as their agent, and having so done, they are not at liberty to treat him as a wrong-doer.

τοὶ γὰρ οὗτοι οὐκ ἐστὶν ἄλλοι

HOLDRUP J.: I think the plaintiffs adopted the acts of the defendant by accepting the balance of the account. By doing so, they at all events either recognized him as their agent in the sale of the bankrupt's goods, or they must have received the amount of that balance as a satisfaction for the wrongful act done by the defendant. If they have treated him as their agent, they cannot afterwards treat him as a wrong-doer, and maintain trover. If, on the other hand, they accepted the balance of the account as a satisfaction for the wrongful act, the acceptance of that sum is an answer to the action.

Verdict for defendant.

1827.

Contra
agendum
 The Knap
 Water-works
 Company.

section it was enacted that the commissioners might, and they were thereby empowered, at any meeting at which not less than thirteen commissioners should be present, by writing under their hands to appoint a treasurer as they the said commissioners should think proper. By the thirteenth section it was enacted that wherever any action should be brought by the order of the commissioners against any person or persons, the same might be brought in the name of the treasurer. By the sixteenth and seventeenth sections it was further enacted that the commissioners should, at any of their meetings to be held in pursuance of that act, settle and ascertain the sums of money respectively necessary for the relief, &c. of the poor of the said parish, and also for paving, cleansing, lighting, and watching the streets, &c., providing a burial ground, and the several other purposes of the act; and should, and they were thereby required to make and sign a rate or rates, not exceeding the amount of their respective sums so settled and ascertained, upon all and every the person or persons who did inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament within the said parish. By the twenty-third section it was further enacted, that after any rate should have been so rated, assessed, and charged by the commissioners for the purposes of the act, the collector was thereby required to collect the same accordingly; and in case any person or persons who should be rated should refuse or neglect to pay such rate to any collector for twenty-one days after personal demand made by the collector thereof, or demand in writing under the hand of such collector, and left at the last or usual place of abode of the person

1827.

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Coulson,
registrar,
The Crown
Works
Company.

or persons so refusing or neglecting to pay as aforesaid, or on the premises so charged with such rate, then after summons and default of payment, the same was to be levied by distress and sale of the goods and chattels of such person or persons so refusing or neglecting to pay as aforesaid, or on the goods and chattels found on the premises; or it should be lawful for the commissioners to recover any such rate payable by virtue of that act, by action of debt or on the case, in any of his Majesty's courts of record at *Westminster*. By the 92d section it was enacted, that the then overseers of the poor of the said parish should continue to be overseers for the remainder of the year 1807, and until two other overseers should be nominated and appointed in the manner and at the time by law directed to succeed them; and in *Easter* week, or within one month of *Easter* in each and every year, two persons, being substantial householders in the parish, should be nominated and appointed, in the manner by law directed, to be overseers of the poor of the said parish; provided always that such overseer and overseers should in all cases account to and be liable to the control, orders, and directions of the commissioners, at all their meetings to be held in pursuance of that act. By section 106. it was further enacted, that if any person or persons should think himself, herself, or themselves aggrieved by any rate or rates made by virtue of the act, such person or persons might complain to the commissioners, at any meeting to be holden within two months, and such commissioners were thereby authorized and empowered, if they should think such person or persons aggrieved, to give such relief in the premises as to them should seem necessary; and if any such per-

1827.

1828.

Covis

against

The King
Water-works
Company.

section it was enacted that the commissioners might, and they were thereby empowered, at any meeting at which not less than thirteen commissioners should be present, by writing under their hands to appoint a treasurer as they the said commissioners should think proper. By the thirteenth section it was enacted that wherever any action should be brought by the order of the commissioners against any person or persons, the same might be brought in the name of the treasurer. By the sixteenth and seventeenth sections it was further enacted that the commissioners should, at any of their meetings to be held in pursuance of that act, settle and ascertain the sums of money respectively necessary for the relief, &c. of the poor of the said parish, and also for paving, cleansing, lighting, and watching the streets, &c., providing a burial ground, and the several other purposes of the act; and should, and they were thereby required to make and sign a rate or rates, not exceeding the amount of their respective sums so settled and ascertained, upon all and every the person or persons who did inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament within the said parish. By the twenty-third section it was further enacted, that after any rate should have been so rated, assessed, and charged by the commissioners for the purposes of the act, the collector was thereby required to collect the same accordingly; and in case any person or persons who should be rated should refuse or neglect to pay such rate to any collector for twenty-one days after personal demand made by the collector thereof, or demand in writing under the hand of such collector, and left at the last or usual place of abode of the person

or persons so refusing or neglecting to pay as aforesaid, or on the premises so charged with such rate, then after summons and default of payment, the same was to be levied by distress and sale of the goods and chattels of such person or persons so refusing or neglecting to pay as aforesaid, or on the goods and chattels found on the premises; or it should be lawful for the commissioners to recover any such rate payable by virtue of that act, by action of debt or on the case, in any of his Majesty's courts of record at *Westminster*. By the 92d section it was enacted, that the then overseers of the poor of the said parish should continue to be overseers for the remainder of the year 1807, and until two other overseers should be nominated and appointed in the manner and at the time by law directed to succeed them; and in *Easter* week, or within one month of *Easter* in each and every year, two persons, being substantial householders in the parish, should be nominated and appointed, in the manner by law directed, to be overseers of the poor of the said parish; provided always that such overseer and overseers should in all cases account to and be liable to the control, orders, and directions of the commissioners, at all their meetings to be held in pursuance of that act. By section 106. it was further enacted, that if any person or persons should think himself, herself, or themselves aggrieved by any rate or rates made by virtue of the act, such person or persons might complain to the commissioners, at any meeting to be holden within two months, and such commissioners were thereby authorized and empowered, if they should think such person or persons aggrieved, to give such relief in the premises as to them should seem necessary; and if any such per-

son

1827.

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Waterworks
Company.

1887.

Decided
against
The Kent
Water-works
Company.

son or persons should not be satisfied with the determination of the commissioners, or should neglect to complain to them at any such meeting, within the time aforesaid, then it should be lawful for such person or persons to appeal to the then next general or quarter sessions of the peace to be holden for the county of Kent, which should happen next after the expiration of twenty-one days from the determination of such commissioners; in every case such appellant or appellants first giving eight days' notice, at least, in writing, of his, her, or their intention to bring such appeal, and of the matter thereof, to the clerk or clerks to the commissioners, and within two days after such notice entering into a recognizance in the sum of 20*l.*, with two sureties in the sum of 10*l.* each, before some justice of the peace for the said county, conditioned for prosecuting such appeal.

By an act of the 48 G. 3. c. 146. it was enacted, that it should be lawful for the commissioners appointed by the 47 G. 3. c. 111, or any seven or more of them, to raise and convey water from a field in the parish of *Charlton*, in the county of *Kent*, therein mentioned, along the high road leading from *Gravestock* into the said town of *Woolwich*, and along another high road therein mentioned, into certain reservoirs therein mentioned, and to convey and distribute water from every such reservoir in pipes through the said town and parish to the houses of the inhabitants thereof agreeing with the commissioners to be supplied with such water, and to purchase all ground necessary for making such reservoir or reservoirs, and to erect engines, &c. &c. By the 6th section the commissioners were enabled to borrow at interest a sum not exceeding 14,000*l.*

upon

1827.

County
of Kent
The Kent
Water-works
Company.

upon the credit of the rates. By the 12th section it was enacted, "that in case any surplus should any time arise of the rates after paying the interest of the money borrowed and the expences of carrying the act into execution, the same should be applied towards the relief of the poor of the parish of *Woolwich*, in such manner as the commissioners, or any seven or more of them, should think proper."

By an act passed in the 49 G. 3. c. 189. certain persons therein named, and others their successors, were incorporated by the name of the company of proprietors of the *Kent Water Works*, and such corporation exists at the present time.

By an act passed in the 51 G. 3. c. 145. the defendants were empowered to supply with water, amongst other places, that of *St. Mary, Woolwich*; and it was by the third section enacted, that it should be lawful for the company of proprietors, and they were thereby authorized and required to contract and agree with the commissioners acting under the acts of the 47 G. 3. c. 111. and the 48 G. 3. c. 146. (already set out) for the absolute purchase of, and the commissioners or any three or more of them, were thereby authorized and empowered to sell, convey, assign, and assure to the company of proprietors, all certain piece or parcel of land belonging to the said commissioners, and purchased by them of Mr. Jackson, situate in the parish of *Woolwich*; and also the interest of the commissioners of and in certain springs of water arising or flowing in certain fields therein described, situate in the parish of *Charlton*; any thing in the last-mentioned acts to the contrary notwithstanding; and that upon such purchase it should be lawful for the company of proprietors to use the said piece or parcel

1827.

—
CORTIS
against
The KENT
Water-works
Company.

parcel of land, and the springs of water, for the purposes of the act of the 49 G. 3. c. 189. and of the act now in recital, or any of them, in such and the like manner as the commissioners could or might have used or enjoyed the same prior to the making of any such conveyance or assignment.

This action was commenced on the 17th of *October* 1825, in the name of *G. Cortis*, as the treasurer to the commissioners, against the company of proprietors of the *Kent Water Works*, under the following circumstances: —

At a general meeting of the commissioners, duly held on the 7th of *October* 1823, it was resolved that the company of proprietors of the *Kent Water Works* should be proceeded against for the recovery of the parochial rates in arrear, if *Mr. Nokes* (who was the solicitor to the commissioners), with the advice of counsel, should be of opinion that the parish could maintain an action. The opinion of counsel was obtained, and the solicitor to the commissioners afterwards brought the present action by their advice.

At the time when the resolution was made, *Mr. Thomas Rideout* was the treasurer to the commissioners; but before the action was commenced, *Mr. Cortis* had been appointed the treasurer, and was so at the time of its commencement, before which period (*viz.* on the 17th of *May* 1825), the solicitor to the commissioners having reported that a certain advance of money would be necessary for obtaining an original writ in order to commence the action and for other expences, the commissioners advanced him a sum of 50*l.* for those purposes. *Mr. Cortis* acted as treasurer from the 2d day of *May* 1825, under a resolution of the

the

the commissioners for that purpose, and the appointment of Mr. Gossit as treasurer took place on the 14th of *June* 1825, at a meeting at which seventeen of the commissioners were present, but of them, twelve only signed this appointment.

1827.

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 Cases
 against
 The Kent
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The first assessment sought to be recovered in this action was made on the 1st of *August* 1815, and in the following manner: At a general meeting of the commissioners acting under the provisions of the 47 G. 3. c. 111., duly holden in pursuance thereof on the 27th of *June* 1808, it was resolved and deemed necessary to raise a sum not exceeding 1800*l.* for the use of the poor, and a sum not exceeding 500*l.* for the highways, by a rate of 11*d.* in the pound for the poor, and 3*d.* in the pound for the highways. In pursuance of this resolution a rate was prepared, and the assessment made at 14*d.* in the pound for the poor, and 8*d.* in the pound for the highways; and at a subsequent meeting of the commissioners, duly assembled on the 1st of *August* 1815, the rate thus prepared was read over and signed by them, in compliance with a resolution then entered into for the purpose. The title of the rate was as follows: "A rate or assessment made the 1st day of *August* in the year 1815, and by virtue of an act of parliament passed in the forty-seventh year of the reign of his present Majesty, intituled "An Act, &c." (the title of the act was set out); such rate or assessment being at 11*d.* in the pound for the relief of the poor, and the further sum of 8*d.* in the pound for paying, cleaning, lighting, and watching the streets, making for the whole the sum of 1*s.* 8*d.* in the pound, and being for three months to *Midsummer-day* 1815. The assessment on the company of proprietors of the Kent Water-works, amounted to 24*l.* 7*s.* 8*d.* And after

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apportioning the different assessments, the rate is thus concluded: "We, whose names are hereunto subscribed, commissioners, amongst others, for carrying into execution the act of parliament mentioned in the introductory part of this rate, having previously adjudged, settled, and ascertained it to be necessary to raise a sum not exceeding 1300*l.* for the relief of the poor of the said town and parish, and a sum not exceeding 500*l.* for paving, cleansing, lighting, and watching the streets, lanes, &c. within the said town and parish, have rated and assessed upon all and every person and persons in such rate and assessment named for the purposes, and in the proportions expressed and set forth in the introductory part of this rate, the several sums of money set opposite to his or their respective names. As witness our hands, the said 1st of August 1815."

All the subsequent rates for the use of the poor, and for the streets to July 1825 inclusive, were made in a similar manner, and with similar formality, and had similar titles and conclusions. The aggregate amount of these several rates, being thirty-five in number, upon the defendants, was 1129*l.* 2*s.* 2*d.*

The assessment of 1*l.* in the pound on the actual rental of the parish of Woolwich amounted to 1871*l.* 14*s.* and the assessment of 3*d.* in the pound for the highways amounted to 374*l.* 2*s.*, making together 1745*l.* 16*s.*, the sum which would have been raised if the whole had been collected; but the sums actually collected under the two assessments, and which were jointly collected, amounted to 1450*l.* only. And the subsequent assessments and rates were open to the same observation.

In addition to the thirty-five rates, there were six other rates for the use of the poor and for the highways, each of which included a gaol rate. The portions of these

these six rates charged upon the defendants applicable to the poor and the highways amounted to the sum of £44. 6s.; the portions applicable to the gaol amounted to 57. 18s.

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The gaol rates were made under the 54 G. 3. section 15. which enacted, "that the justices of the peace assembled for the county of *Kent* at the general session to be holden for the county in pursuance of that act, should yearly, until all the charges and expences of building and completing the new gaol and court houses, incurred and to be incurred since the then last Easter quarter sessions, should be paid and satisfied, assess and tax a special county rate for the payment of such charges and expences, on all and every parish, township, &c. in the county, within their respective divisions, now contributing or liable to contribute to the ordinary county rate, at a sum not exceeding the sum of 60. in the pound over and above the ordinary county rate, by one or more rates in each year, on the rental at which each parish, township, liberty, &c., and extra-parochial or other place should be rated, taxed, and assessed to the ordinary county rate; and the said special rate should be collected, levied, and recovered in like manner, and by such ways and means, and under such penalties, as any county rate might be collected and recovered in the county of *Kent*; and the overseers and overseer of every parish, township, or place maintaining its own poor, within the county of *Kent*, should and might, and was and were thereby authorized and empowered to levy and raise such rate in like manner, and by such ways and means, and under such penalties, as any poor rate then was by law collected; provided always, that every tenant or occupier paying such rate might deduct and retain out of the rent payable to his

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landlord or landlords for the premises in respect of which such rate was payable, one half part of the full amount of such rate, it being the intent and meaning of the act that the half of such rate, except as thereafter excepted, should be borne by the landlord; and every landlord should and was thereby required to allow and make such respective deductions accordingly; and every such tenant paying or having levied upon him such rate, should be acquitted and discharged of and from so much money as such half part should amount to; as fully and effectually as if the same had been actually rent paid to any such landlord or landlords in part of the rent due from such tenant."

The justices of the peace being duly assembled at a general session in pursuance of the provisions of this statute, did, on the 5th of *July* 1814, tax and assess a special county rate upon every parish and other place in the county within their respective divisions, at the rate of 3*d.* per pound upon the rental of each parish and place; and an entry was made in the county books in the following form: — "This Court for making a general rate or assessment towards payment of the charges and expences of building and completing the new gaol-house of correction and court-houses for the town of *Maidstone*, incurred and to be incurred since the last *Easter* quarter sessions, doth, in pursuance of an act of parliament passed in the present session of parliament, entitled, &c. assess upon all and every the parish, township, liberty, &c. in the said county," the sums following, viz. "the sum of 276*l.* 13*s.* 6*d.* upon *Woolwich*, being at the rate of 3*d.* in the pound upon the estimated rental of that parish." Then followed the assessment upon other places, and then the entry was thus continued: — "This Court doth order that the said several sum and

and sums of money so assessed on the said several and respective towns, parishes, and places, shall be paid out of the money collected or to be collected for the relief of the poor of such parish or place, by the *churchwardens and overseers* for the time being, of each and every the parishes and places aforesaid, to the high constable of the respective hundreds and divisions wherein such parishes or places shall be, within thirty days after demand thereof shall be made in writing." On the 26th *January* 1815 a similar assessment of 276*l.* 13*s.* 6*d.* was made on the parish of *Woolwich*, at the rate of 3*d.* in the pound on their estimated rental, according to the provisions of the statute. On the 29d *October* 1815 a similar assessment of 184*l.* 9*s.* was made on the parish of *Woolwich*, being at the rate of 2*d.* in the pound on their estimated rental, according to the provisions of the statute. Each of these several sums of 276*l.* 13*s.* 6*d.*, 276*l.* 13*s.* 6*d.*, and 184*l.* 9*s.*, was paid out of the monies raised for the relief of the poor under the 47 G.3. sess.2. c. 111, by the treasurer to the commissioners acting under that statute, to the high constable of the hundred, and by him paid to the county treasurer at the quarter sessions next after the times of the respective assessments. At a general meeting of the commissioners acting under the provisions of the 47 G.3. duly holden in pursuance thereof on the 5th of *January* 1816, it was resolved and adjudged, and deemed necessary to raise a sum not exceeding 800*l.* for the use of the poor, a sum not exceeding 400*l.* for the highways, and a sum not exceeding 800*l.* for defraying the expences of the gaol and court-houses; and that a rate be immediately made for those purposes, at 6*d.* in the pound for the poor, 6*d.* in the pound for the new gaol, and 3*d.* in the pound for paying, &c. In pursuance of this resolution

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a rate was prepared, and an assessment made at 6*d.* in the pound for the poor, and 3*d.* in the pound for the highways, and 6*d.* in the pound for the expences of the gaol and court-houses; and at a subsequent meeting of the commissioners duly assembled on the 9th of *January* 1816, the rate thus prepared was read over and signed by them, in compliance with a resolution entered into for the purpose. The title of the rate was, "A rate or assessment made the 9th day of *January* 1816, by virtue of an act of parliament passed in the 47 *G. 3.*; and also by virtue of several acts passed in the 43*d.*, 47*th.*, 49*th.*, and 54*th.* years of *G. 3.*, for erecting a gaol and court-house at *Maidstone*, in the said county, upon all and every person and persons holding, &c. occupying lands, &c. within the parish, as well for the relief of the poor as also for paving the streets, lanes, &c. in the parish; and also towards defraying the expences of erecting such gaol and court-houses, such rate or assessment being at 6*d.* in the pound for the relief of the poor, and 3*d.* in the pound for such paving, &c., and 6*d.* in the pound for such gaol and court-house, making in the whole the sum of 1*s.* 3*d.* in the pound, and being for three months to *Christmas* day 1815. The assessment, which was joint for the poor, the highways, the gaol and the court-houses, on the company of proprietors of the *Kent* Water-works, amounted to 26*l.* 2*s.* 6*d.* That part of the assessment which was made for defraying the expences of the gaol and court-houses was to repay the several sums of 276*l.* 13*s.* 6*d.*, 276*l.* 13*s.* 6*d.*, and 184*l.* 9*s.*, amounting together to 737*l.* 16*s.*, which had been paid over, as before mentioned, to the treasurer of the county of *Kent*. An assessment of 6*d.* in the pound upon the actual rent of the parish of *Woolwich*, in *January* 1816, would, if the proceeds had all been collected, have produced

produced 761*l.* 2*s.* 8*d.*, but the amount of the sums collected was only 679*l.* 5*s.* And it was impossible in the parish to collect the whole amount of any assessment.

On the 29th *April* 1816, the justices of the peace, at a general session holden in pursuance of the 54 G. 3. c. 104, made a similar assessment for the gaol and court-houses on the parish of *Woolwich*, of 276*l.* 13*s.* 6*d.*, being at the rate of 3*d.* in the pound on the estimated rental, and an entry similar to that before set forth was made in the county books. On the 5th of *August* 1816, a similar assessment of 276*l.* 13*s.* 6*d.* was made on the parish of *Woolwich*, at the rate of 3*d.* in the pound on their estimated rental, and a similar entry was made in the county books. Each of these last-mentioned sums of 276*l.* 13*s.* 6*d.* and 276*l.* 13*s.* 6*d.* was paid out of the monies raised for the relief of the poor under the 47 G. 3. sess. 2. c. 111., by the treasurer to the commissioners acting under the statute, to the high constable of *Woolwich*, and by him paid to the treasurer of the county of *Kent*, at the quarter sessions next after the time of the respective assessments. And on the 14th of *January* an assessment for the use of the poor, for the highways, and for defraying the expences of the gaol and court-houses, the latter at 6*d.* in the pound, was made by the commissioners acting under the 47 G. 3. c. 111, in a similar manner, and according to the same forms as those observed in the assessment of the 9th of *January* 1816 above set forth. The assessment on the company of proprietors of the *Kent* Water-works amounted to 36*l.* 11*s.* 6*d.* That part of the last-mentioned assessment, which was made for defraying the expences of the gaol and court-houses, was to repay the two last-mentioned several sums of 276*l.* 13*s.* 6*d.* and 276*l.* 13*s.* 6*d.*, which had been paid over as above mentioned to the

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treasurer for the county of *Kent*; and also to cover the deficiency in the sum actually collected: by virtue of the rate made on the 9th *January* 1816, the aggregate amount of the two several sums of 276*l.* 18*s.* 6*d.* and 276*l.* 18*s.* 6*d.*, and of the deficiency, is 611*l.* 18*s.* An assessment of 6*d.* in the pound on the actual rental of the parish of *Woolwich* in *January* 1817 would, if the proceeds had all been collected, have produced 755*l.* 18*s.*; but the amount of the monies actually collected was only 666*l.* 6*s.* 6*d.*, which left a surplus, beyond what was required for the specific purposes for which the money was collected, of 54*l.* 8*s.* 6*d.*

The case then stated several other assessments made by the county justices on *Woolwich* between the years 1816 and 1825, the payment of the sums so assessed on *Woolwich* by the commissioners out of the poor rates of *Woolwich*; and subsequent assessments made by them on the parish; for the use of the poor, for the highways, and for defraying the expenses of the gaol and court-houses. That part of the respective assessments made to defray the expenses of the gaol and court-houses respectively being to repay the sums last paid over by the *Woolwich* commissioners to the treasurer of the county of *Kent*, for the county assessments. The commissioners in all these assessments raised a larger sum than that required by the county assessments; and ultimately there remained in their hands a balance of 589*l.* 0*s.* 9*d.* on account of the gaol rate, which balance was afterwards applied to the use of the poor of the parish of *Woolwich*. The rental of the parish of *Woolwich* was variable between the 9th of *April* 1816 and the 3d *November* 1818: it fluctuated between the sums of 90,563*l.* and 23,746*l.*

The company of proprietors of the *Kent* Water-works were

were in the occupation and enjoyment of valuable property of sufficient value, situated within the parish of *Woolwich* at the time the first assessment was made upon them, and have been ever since.

At a general assembly of the company duly convened, the collector appointed by the *Woolwich* commissioners personally served upon the chairman of the assembly, publicly at the meeting, a paper writing, purporting to be a demand on the company of the proprietors of the *Kent* Water-works, of the several rates with which they had been charged, contained in a schedule thereto annexed. And a similar demand in writing, under the hand of such collector, was pasted on a board which was fixed upon the premises of the company at *Woolwich*, and also fixed upon the pipes belonging to the company. In the several rates made on the 1st August 1815, and subsequently until the 30th March 1824 inclusive, the assessment was in the following form: "The Company of Proprietors of the *Kent* Water-works,"—the amount of their assessment was then placed opposite. But in the latter rates the company were rated for and in respect of their land and reservoir, and their pipes. They did not appeal against any of the forty-one assessments under the provisions of the 106th section of the 47 G. 3. sess. 2: c. 111.

This case was argued at the sittings after last *Easter* term by *Bröderick* for the plaintiff, and *Bolland* for the defendants. The question turned entirely upon the construction of the several clauses of the acts of parliament set out in the case, and the arguments urged are commented on in the judgment delivered by the Court, so that it is unnecessary to state them here.

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On several of the points which have been made in this case, we entertain no doubt whatever. The first objection to the plaintiff's right of action was, that a body corporate does not come within the meaning of the sixteenth section of the 47 G. 3, c. 111. The title of the act shows, that the better relief and employment of the poor was one of the purposes which the legislature had in view. It does not appear that there was any intention to exonerate any person who before that time was liable to contribute to the poor rate. But if, by reason of the provisions of this act, corporations be not liable to contribute, then all property belonging to a corporation, which before was liable to contribute to the poor rate, will be exempt; and that without any express words in the act to show that such was the intention of the legislature. The clauses which relate to the raising of the poor rate are the 16th, 17th, and 28d. By the 16th section, the commissioners are to make rates upon all and every the *person or persons* who do or shall hold, occupy, possess, &c. any land within the parish. The words *person or persons* may be confined to individuals in their natural capacity, or they may extend to bodies politic. By the statute of the 43d Elizabeth, which is a statute in pari materia, "every inhabitant, parson, vicar, and occupier of any land or tenement," is liable to contribute to the relief of the poor. Now those words do not of necessity extend to a corporation. But they have been construed to include a corporation. *Rex v. Gardiner (a)*. That statute also gives the right of appeal to any *person or persons* aggrieved by any rate. It is said, however, in this case, that it must be collected from the

(a) Comp. 79.

appeal clause of this act that corporations were not intended to be included, inasmuch as the person or persons appealing against a rate are required to enter into a recognizance, and that a corporation cannot do so. If it were necessary to decide that point, I should pause before I said that a corporation is not competent to enter into a recognizance. I am aware that there is a dictum (a) to shew that they cannot do so; but as they may appoint an attorney for a variety of purposes, I am not satisfied that they may not do so for the purpose of entering into a recognizance. But assuming that they cannot enter into a recognizance, yet if they are *persons* capable of being aggrieved by and appealing against a rate, I should say that that part of the clause which gives the appeal applies to all persons capable of appealing, and that the other part of the clause which requires a recognizance to be entered into applies only to those persons who are capable of entering into a recognizance, but is inapplicable to those who are not. But it has been said, that when the legislature intended that corporations should be included, they are specially named; as, for example, in the stat. 47 G. 3. c. 111. s. 66., which enables bodies politic and all corporations, feoffees in trust, husbands, guardians, committees of lunatics, or other trustees, on behalf of themselves and their successors, and their respective cestui que trusts, &c., to sell and convey to the commissioners any property which they are entitled to purchase under the act. The object of that clause is to enable a class of persons, who by law are otherwise incapable of selling their property, to sell such property to the commissioners for the purposes of this act. It required an express enactment to enable such persons

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(a) *Moore*, 68.

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to sell their property. Corporations, therefore, would not be included in such a clause, unless they were expressly named.

The second objection was, that no personal demand of the rate has been made upon any single individual, but there was a corporate meeting held under the provisions of the act of parliament, with a chairman duly authorized to preside over it, and the collector made a demand at that meeting which appears to me to be sufficient.

The third objection was, that the party suing was not duly appointed treasurer. The 11th section of the act says, "that the commissioners may and are hereby empowered, at any meeting at which not less than thirteen commissioners shall be present, by writing under their hands, to appoint a treasurer." It is said, that it is not only necessary the thirteen commissioners should be present at the meeting, but that thirteen must sign the appointment of the treasurer. It appears to me, that the words of that section do not require that the appointment should be signed by the thirteen. The general rule is, that where a power of a public nature is committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority, *Grindley v. Barker* (a); and in this case the fourth section of the act contains an enactment to that effect. And when the eleventh section authorizes thirteen commissioners present at a meeting to do an act, if seven of the thirteen concur in doing that act, it is a sufficient compliance with the act of parliament; because the act of seven, being a majority of the number present, will bind all. And, therefore, if thirteen only were present, and seven of them concurred in affixing their signature to

(a) 1 Bos. & Pull. 229.

the appointment, that would be an appointment under the hands of the majority of the persons present. In this case seventeen commissioners were present, and the instrument was signed by twelve, who constituted the majority of that meeting.

The fourth objection was, that the plaintiff was not duly authorized to bring the action. It is quite clear, however, that the order of the 7th *October* 1823 contained a sufficient authority to the treasurer to commence the action. But it is said, that Mr. *Rideout* was the treasurer at the time when that order was made, and that although Mr. *Cortis* was treasurer when the action was commenced, there ought to have been a new order. The order, however, does not purport to be an authority to any particular individual to bring the action in his own name, but it merely directs that the action should be brought. It is a consequence of law resulting from that order, that the action must be brought by the person who, at the time of bringing the action, shall be treasurer to the commissioners.

Then the fifth objection was, that the present plaintiff could only be entitled to recover for that part of the rates which became due after he was appointed treasurer; but I think that is not a valid objection, for the plaintiff is not suing for any thing due to himself, but he is a mere nominal party suing for those commissioners for whose benefit the action is to be brought. Whether the rates became due before the plaintiff was treasurer, or afterwards, they must still be sued for in his name, and in his name only.

The sixth objection was, that the amount of the rates was not legally ascertained. Upon that point the Court will take time to consider their judgment.

The seventh objection was, that there is too much uncertainty

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certainty in the specification of the property rated. That was a ground of appeal, and it is not competent to these parties to make it a ground of objection in this action. *Hutchins v. Chambers* (a) is an express authority to shew that that objection could only be made by way of appeal.

The eighth objection, that the rates directed to be levied, if calculated upon the rental of the parish, would produce more than the sums ascertained to be necessary, also turns upon the construction of the sixteenth section, which we shall reserve for future consideration.

The ninth objection, which applies to the gaol rate, depends upon the construction of the 54 G. 3. s. 15. That section enacts, "that the justices, &c. assembled at sessions shall yearly, until all the expenses of building and completing the new gaol house and court houses shall be paid and satisfied, assess and tax a special county rate for the payment of such expenses, in all and every parish, &c.; and the said special rate shall be collected, levied, and recovered, in like manner, and by such ways and means, and under such penalties, as any county rate may be collected, levied, and recovered in the said county of Kent; and the *overseers and overseer* of every parish, township, or place, maintaining its own poor within the said county, shall and may, and is and are hereby authorized and empowered to levy and raise such rate, in like manner, and by such ways and means, and under such penalties, as any poor rate is now by law collected." The words in this clause are "*overseers and overseer*;" and the objection is, that in *Woolwich* there are persons who exercise the ordinary duties of overseers, and that they and not the commissioners should levy this rate. But this act of

(a) 1 Burr. 580.

parliament was intended to apply to the county at large, and not to a particular parish; and if in any particular parish power to make and levy rates is taken from the ordinary overseers and given to other persons, those persons are fairly within the meaning of the words overseers and overseer, as used in this act of parliament, for they are overseers for the purpose of levying and making this rate. I think that the commissioners are overseers, within the meaning of this act of parliament, and that the rate was properly levied by them.

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HOLROYD J. I entirely concur in the opinion of my Brother Bayley as to the points on which he has pronounced his opinion, and as to the propriety of further considering the other points. As to the appointment of treasurer, I am of opinion that, according to the true construction of the seventh and thirteenth sections of the 47 G. 3. c. 111., it is sufficient that the appointment of treasurer should be signed by a majority of the commissioners present at the meeting at which the election takes place. The election is an act done by that majority, and although it is necessary that thirteen commissioners should be present at a meeting at which a treasurer is elected, it is not necessary that the formal appointment should be signed by all the commissioners present, but only by that majority who elect him. If that were not so, it would be in the power of a minority to impede, if not prevent, the completion of the appointment. It seems to me that the election, which was an act done by the majority, was sufficiently evinced by the signature of the majority; for although some of the members present at the meeting may disapprove of the act of the majority, they cannot dispute the act of the whole body. The act of the majority is to be considered,

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aided, in point of legal effect, the act of the whole body. The election in this case being an act of the majority, I think it was not necessary that the whole body, nor even that all the commissioners present at the election, should subscribe the formal appointment. The number thirteen required by the legislature to be present at the election includes those who assent to the appointment, as well as those who dissent from it. I entertained great doubts during the argument upon the objection raised as to the gaol rate, but I am now satisfied upon that point. The ninety-fourth section of the 47 G. 2. invests the commissioners named in that act with all the power for the relief of the poor which churchwardens and overseers had. I think the meaning of the fifteenth section of the 54 G. 2. (which statute is applicable to the county at large) is, that the rate shall be collected by the persons by whom the poor rate was to be collected, viz. by those who virtually exercise the office of overseers of the poor. In this case these commissioners under the *Woolwich* act virtually execute the office of overseers of the poor, and more particularly with regard to the collection of rates and receiving the money raised by the collectors. They are, in fact, the overseers for that purpose, and it is their duty to attend to the poor rate. I think, therefore, that they were entitled to levy the gaol rate.

LITTLEDALE J. I am of the same opinion. I think that a corporation is liable to be rated by the sixteenth section of the *Woolwich* act. It has been said, that as the 106th section gives an appeal to any persons or persons aggrieved by any rate, upon such appellants giving the notice therein mentioned and entering into a recognizance with two sureties, and that as a corporation

ation cannot enter into a recognizance, this provision shews clearly that a corporation was not intended to be included by the legislature in the act of parliament, because it could not be intended to compel a corporation to do an act which is impossible. But where an act of parliament directs a thing to be done which it is impossible for a corporation to do, but which other persons may do, and another act which a corporation as well as others can do, then the corporation will be excused from doing the thing which it cannot do, and will be compelled to do the act which it is capable of doing. Assuming, therefore, that a corporation cannot of itself enter into a recognizance, still its sureties may, and I think, therefore, that a corporation might satisfy this clause, by procuring sureties to enter into such recognizance.

I also think there was a legal demand of the rate. It is said, that inasmuch as the act required a personal demand, and as such a demand could not be made upon a corporation, that shews that the legislature did not intend to include a corporation. The same answer may be given to that as to the former objection; viz. if an act of parliament direct two or three modes of doing a thing, and it be found that one cannot be adopted but another can, it is sufficient that that other be adopted. Here a notice was left on the premises, as well as a demand made at a corporate meeting.

Then as to the appointment of treasurer, the seventh section of the *Woodwick* act provides, that all powers and authorities given to the commissioners may be exercised by a majority of them assembled at any meeting, not less than thirteen being present. The eleventh section enables the said commissioners at any meeting

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(at which not less than thirteen shall be present), by writing under their hands, to appoint a treasurer. Construing those two sections together, I think that a majority of the commissioners (not being less than thirteen) present at any meeting can do all the acts which the entire body can do. I am, therefore, of opinion, that there having been seventeen commissioners present at this meeting, and twelve, constituting a majority of those, having concurred in the appointment of the plaintiff as treasurer, that appointment is valid. I also think that the plaintiff had authority to bring the present action. The act authorizes the commissioners to bring actions in the name of the treasurer. But the action, when brought, is their action, and although the treasurer is the nominal plaintiff, the commissioners are the real plaintiffs.

Then it has been said that the rates are void for uncertainty. If the defendants intended to object to the rates on that ground, they ought to have appealed. It was contended that the defendants were not bound to appeal, because they were not in this case liable to be rated at all. The same argument was urged in *Hutchins v. Chambers* (a) and *Durrant v. Boys* (b). But it was decided, that even assuming the rate to be bad, the property of the defendants was liable to be distrained for the rate, and, consequently, that they were liable to pay it. And if, therefore, the defendant, whose goods were distrained, could not, in an action of trespass, say that the distress was unlawful because the rates were bad, neither can he object to pay the sums for which he is rated in this case, on the ground that the rates are bad

(a) 1 Burr. 580.

(b) 6 T. R. 580.

As to the poor rate, I have entertained great doubts during the course of the argument; but upon the whole, I think that when the legislature, by the act of the 54 G. 3., enacted that the overseers were to levy the county rate, they must be taken to have intended by *overseers* those persons who usually levied the poor rate in each parish respectively; and considering, that although there are overseers in the parish of *Woolwich*, they have no power to levy the poor rate, but that such power has been taken from them and vested in the commissioners, I am of opinion, that the commissioners are overseers within the meaning of the 54 G. 3.

I also think that the other points should be further considered before we pronounce our judgment.

Cur ad. vult.

BAYLEY J. now delivered the judgment of the Court. There were three points in this case reserved for our consideration. The first (which applied to the whole demand) was, whether the commissioners had properly ascertained the sums to be levied pursuant to the statute 47 G. 3. c. 111.? secondly, whether they had not exceeded their authority in some instances? and, thirdly, whether certain poor rates could be supported?

The first question is, whether the resolution of the commissioners, that they deemed it necessary to raise a sum not exceeding 1200*l.* for the poor, and a sum not exceeding 500*l.* for the highways, was a settlement and ascertainment, within the meaning of the act of parliament, that those sums were necessary to be raised?

This objection applies to all the rates. A sum not ex-

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ceeding a given sum is undoubtedly a loose mode of expression, and the amount that was actually raised shews how careless the commissioners were in their calculation; for if 11*d.* in the pound would raise only 1300*l.*, 8*d.* in the pound would raise very little more than 854*l.*: it would have required 4*d.* in the pound to raise 500*l.* The words, *not exceeding a given amount*, taken in one sense, fix that amount as the maximum, and then they signify that sum, or any sum below it; and if that be the sense in which those words are used in this resolution, it is impossible to say that the amount to be raised was settled or ascertained. But may not the words, *not exceeding the sum of 1300*l.**, be used to express the smallest sum which the commissioners in their judgment deemed it necessary to raise; and is not that the only sensible meaning of the words (giving due weight to the whole of the sentence in which they are used)? When it is said to be necessary to raise a certain sum not exceeding a given sum, if the words be understood as denoting the maximum, they have no definite meaning whatever, for in that sense they will be satisfied if it be necessary to raise only a single shilling. But if the words be construed in the other sense as denoting the smallest sum which the commissioners, in the exercise of their judgment, deem necessary to be raised, then their meaning is plain and precise. Suppose, for instance, 500*l.* only, were in fact the sum necessary to be raised for the purposes of the parish; that sum does not exceed 1300*l.*. But an assertion that a sum not exceeding 1300*l.* would be necessary to be raised, would in that case be an untrue assertion, as applied to every sum between 500*l.* and 1300*l.* for

600*l.* would be a sum not exceeding 1300*l.*; yet, according to this hypothesis, 600*l.* would not be necessary to be raised, but 400*l.* only. When, therefore, it is said that it is necessary to raise a sum not exceeding 1300*l.*, the sense in which those words must be understood, in order to give them any rational or definite meaning, must be, that it is necessary to raise 1300*l.*

But assuming that the commissioners have not in a formal mode proceeded to settle and ascertain the sum necessary to be raised for the purposes required, still it may be a question, whether they have not done that which is tantamount to it? for they have directed 11*d.* in the pound to be raised for the poor, and 8*d.* in the pound for the highways. That is an ascertainment of the sum which the collectors are to receive, and the persons who are to pay cannot, therefore, complain that it is left to the discretion of the collectors to determine what is to be raised. The money being in the hands of the treasurer, may it not be said, that there cannot be any other meaning given to the resolution of the commissioners, than that the whole 1300*l.* and 500*l.* shall be applied as directed? In their judgment a rate of 11*d.* and 8*d.* in the pound was necessary to attain the objects of their resolutions. They could not ascertain the precise sum necessary to be raised, as there might be some defaulters and some necessary expenses incurred in levying the rate; but they must have intended that the whole of the sum raised by the two specific rates of 11*d.* and 8*d.* in the pound was to be applied to the objects of those rates, in case it should not exceed the sum mentioned; and if it did exceed that sum, then the surplus would be to be returned; and if it fell short of that sum then a new rate would be necessary to be raised to make up the deficiency.

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The resolution, that it was necessary to raise a sum not exceeding 1300*l.*, seems to me to mean, that it was necessary to raise money to that extent; and that being so, the first of the three objections which I have now mentioned must be overruled.

The next objection is, that the commissioners have exceeded their power, in fixing the amount of certain rates. The power of the commissioners, after settling and ascertaining the sums necessary to be raised is to sign one or more *rate* or rates, not exceeding the amount of the respective sums so settled and ascertained. The sum settled and ascertained to be necessary was 1300*l.* for the poor, and 500*l.* for the highways; and the same commissioners directed that the first sum should be raised by a rate of 11*d.* in the pound, and the other by a rate of 3*d.* in the pound. Now it appears, that if the whole of the rates were collected, then 11*d.* in the pound would raise 1371*l.* 14*s.* for the poor, and that 3*d.* in the pound would raise 374*l.* for the highways; so that if these sums were considered as levied under one rate, that rate would raise less than the two sums which the commissioners resolved to be necessary. The words of the act do not seem to require that the sums raised for the relief of the poor and for the highways should be raised by separate rates, because it merely says that the sum settled and ascertained shall be raised by a *rate* or rates. That implies that one rate might be made, including the sums to be raised for the poor, and for paving the streets, &c. It is true that the whole amount, when raised, must be applied in certain proportions, viz. eleven-fourteenths to the poor, and three-fourteenths to the purpose of paving the streets, &c., but still the whole may be included in one rate,

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and one collection. It seems to me, therefore, that considering this as one entire rate, and that the entire sum raised would be less in the whole than that which the commissioners resolved to be necessary for both purposes, this objection also fails. Another answer to this might be, that although the 11*d.* in the rate might make the rate exceed 1300*l.*, if the whole had been collected, yet there was no chance that the whole, or so much as 1800*l.*, would, in fact, be raised upon it.

The last question is as to the gaol rate imposed by the 54 G. 3. c. 104. s. 15., which enacts, that the justices of the county, at sessions, shall assess and tax a special county rate, for the payment of the expenses of building and completing the gaol, on all parishes and places contributing to the ordinary county rate, by one or more rate or rates. There is a proviso that every tenant or occupier paying such rate may deduct out of the rent payable to his landlord one half of the amount of the rate. The sessions fixed a specific rate from time to time upon the parish of *Woolwich*, and described it to be so much in the pound upon the estimated rental of the parish, and directed the parish officers to pay these specific sums to the high constable. The commissioners under the *Woolwich* act paid those sums accordingly, but they did not collect from the parishioners any of the sums necessary to pay such special county rates, until a considerable period after they had made such payments; and although all the sums raised by the commissioners for this purpose, except the first, were more than the specific sum fixed by the sessions, the commissioners made no allowance for such excess in future rates, and they in the whole raised 589*l.* more than the various sums fixed by the sessions for the contribution of

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Woolwich, on account of the gaol, would amount to. That sum was afterwards appropriated by the commissioners to the relief of the poor; but if the rates raised by them were radically bad, this appropriation will not cure the objection, and will not enable the commissioners to compel the defendants to pay their proportion of these rates.

There are two objections to these rates. The first (which applies to them all) is, that they are retrospective, and have the effect of casting upon the tenants at one period burdens which ought to have fallen on those who were the tenants at a preceding period. The second objection applies to all the rates except the first: they direct a levy to the full extent of the pound rate named by the sessions, when it appeared from the preceding levies that a rate to that extent could not be necessary. The first assessment, for instance, by the sessions, was made in *July* 1814, and the amount fixed for *Woolwich* was 276*l.* 13*s.* 6*d.*, being at the rate of 3*d.* in the pound on the estimated rental of the parish, which was to be paid to the county treasurer in *August*. There were similar assessments in *August* and *October* 1815, and the sums were paid out of the monies collected for the relief of the poor. But no distinct poor rate was made on the parish for any of these assessments until *January* 1816. The persons, therefore, who at that time were landlords and tenants, were called upon to bear a burden which ought to have been borne by the landlords and tenants in *July* 1814, and *January* and *October* 1815. In *April* and *August* 1816 similar assessments were made by the sessions. Every one of the gaol rates made by the commissioners under the *Woolwich* act was made to pay sums previously paid by them;

them; and the effect of that was to throw the burden of the rate not upon those occupiers who ought to bear it, but upon some other persons who by law were not liable to bear it. And as to the sum of 589*l*. 0*s*. 9*d*., which the commissioners ought not to have levied on account of the gaol, the effect of their being allowed to enforce payment of that sum would be to throw on the landlords a burden to which by law they are not liable, for the tenant and not the landlord is liable to contribute to the poor rate. These objections to the gaol rates appear to us to be fatal, and we are, therefore, of opinion, that the commissioners cannot recover the sum charged on the defendants in respect of these rates. There must, therefore, be a proportionate deduction from the amount of the verdict in respect of the gaol rates. But as to all the other parts of the demand, we are of opinion that the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

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ARLETT *against* ELLIS, SHEFFORD, and Others.

Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c. and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C., and that a certain messuage and four acres of land was parcel, and a customary tenement of that manor, and that there is, and from time whereof, &c. there hath been a custom

DECLARATION stated, that on, &c. the defendants broke and entered a certain close of the plaintiff, at the parish of *Yately*, in the county of *Southampton*, and forced and broke open, and broke to pieces the plaintiff's gates, standing and being in and upon the close; and with feet in walking trod down, &c. the grass of the plaintiff there growing and being; and broke down, prostrated, and destroyed the hedges and fences of the plaintiff there standing and being; and also cast and threw divers large quantities of earth, stones, and rubbish, into and upon the close of the plaintiff; and by means of the premises prevented the plaintiff from having the use, benefit, and enjoyment of his close and his hedges and fences, in so large and ample a manner as he might and would otherwise have done, to wit, at, &c. Plea, as to all the trespassers, that the close in which, &c. before and at the said several times when, &c. was and is within the manor, that the customary tenant of that tenement shall have common of pasture upon the plaintiff's close. That J. S., being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c., and put his cattle in, and because the hedges and fences had been improperly erected, defendant threw them down. The plaintiff, in his replication, took issue upon the custom, and new assigned that the defendant entered for other purposes than those mentioned in the plea: Held, first, that upon the issue joined upon the replication, the plaintiff was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the locus in quo under such custom, and that it was not necessary that that custom should be specially replied.

Held, secondly, that a custom for the lord of a manor to inclose the waste without limit or restriction, being inconsistent with the rights of the commoners, was bad in point of law; but that a custom to inclose (even as against common of turbary,) parcels of the waste, leaving a sufficiency of common, was good, and that it lay on the lord, or his grantee, to show that a sufficiency of common was left.

When the lord or his grantee erects fences upon the common, the commoner may by law destroy the fences, and, therefore, the fact of the defendant's having entered upon the plaintiff's close, and thrown down the whole of the fences which he had erected, when they might have entered upon the close without throwing down any part of the fences, was held not to be evidence that they entered for other purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plaintiff on the new assignment.

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within and parcel of the manor and hundred of *Cron-*
dall; and that a certain messuage and four acres of
 land with the appurtenances, at the said several times
 when, &c. were, and from time immemorial have been
 within and parcel of the said manor and hundred of
Crondall, and a customary tenement of that manor de-
 mised and demiseable by copy of the court rolls; that
 within the manor *there is* and from time whereof, &c.
 hath been an ancient custom there used and approved
 of, that every customary tenant of the said customary
 tenement, from time whereof, &c. have, and each of them
 hath had, used, and been accustomed to have, *and still*
of right ought to have, for himself and his farmers, oc-
 cupiers of such customary tenements, common of pas-
 ture in, upon, and throughout *the said close in which, &c.*
 for all their commonable cattle levant and couchant.
 The plea stated a grant of the customary tenement by
 the lord of the manor of the said customary tenement,
 to *J. Shefford*; that *J. Shefford* entered and became seised
 thereof in his demesne, as of fee, at the will of the lord
 of the said manor and hundred, according to the cus-
 tom of the manor and hundred, *and at the several times*
when, &c. was in the actual occupation thereof, *and*
entitled to such common of pasture as aforesaid, where-
 fore the defendant *J. Shefford* at the said several times
 when, &c. *having occasion to use his common of pasture*
 in his own right, and the other defendants as his ser-
 vants, and by his command at the said several times
 when, &c. entered the said close in which, &c. in order
 to put, and did then and there put into and upon the
 same his cattle, being his *J. Shefford's* commonable
 cattle, &c. and to use the said common of pasture of him
J. Shefford there, and in so doing they the said defend-

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ants, with their feet in walking, trod down a little of the grass, and because the said hedges and fences had been wrongfully erected, and were wrongfully standing and being in and upon the said close in which, &c. (so that without pulling down and destroying the hedges and fences, the defendant *J. Shefford*, could not use or enjoy his said common of pasture, in and throughout the said close in which, &c. in so ample and beneficial a manner as he otherwise might and would and ought to have done), he *J. Shefford*, in his own right, and the other defendants, as his servants pulled down and a little destroyed the said hedges and fences, and in so doing unavoidably cast and threw the said earth, stones, and rubbish into and upon the said close, doing no unnecessary damage to the plaintiff or the said hedges or fences on the occasions aforesaid. The third plea claimed a right of common of turbary upon the close, to cut, dig, and take turf. The replication took issue upon the custom, and new assigned, that the defendants, on other and different occasions and for other purposes than those in the said pleas respectively mentioned, or any or either of them, and in a greater degree and to a greater extent, and with more force and violence than was necessary for abating and removing the said supposed stoppages and obstructions in the said pleas respectively mentioned, committed the several trespasses. The defendants joined issue on the replication, and pleaded not guilty to the new assignment. At the trial before *Park J.* at the Spring assizes for the county of *Hants* 1827, the plaintiff proved, by the deputy steward of the manor of *Grondall*, a grant by the rod, of the 31st of *October* 1825, made to him by the Dean and Chapter of *Winchester*, lords of

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that manor, of two acres of land, bounded on the north by the park pales of the plaintiff; on the south, by the western road; on the east, by the tithing of *Harley*, and a house and garden belonging to one *Curley*; and on the west by a road leading to *Pately*, part of the waste of the manor; to hold to the plaintiff, his heirs and assigns for ever, according to the custom of the manor, at the yearly rent of 2s. 6d., and all other burdens and services, and the plaintiff paid a fine of 8*l.* and was admitted tenant. It was proved that the plaintiff, in *February* 1826, began to inclose the piece of ground, and made an embankment; and that before the inclosure was completed the defendants, on the 7th of *March*, entered upon the land and threw down the embankment. There was neither turf fit for fuel nor pasture on the land in question; and the defendants had no cattle with them, nor any instrument to cut turves. They might have entered upon the common and upon the piece of land in question, and turned on their cattle, without throwing down the embankment. The defendants then gave evidence in support of the right of common of pasture and of turbary claimed in the plea. The plaintiff in reply, in order to prove a custom by the lord to inclose parcels of the waste, produced in evidence the court rolls, containing entries of various grants of parcels of the waste made by the lords of the manor, from the year 1650 to the time of the trial. It did not appear, on the face of the grants that they were made with the consent of the homage, or that a sufficiency of common remained for the commoners. It was contended by the defendant's counsel, that this evidence was not admissible upon the issue joined in this case, the issue being, whether the custom stated in

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in the plea existed; and assuming that the evidence was admissible, the custom itself being without limit or restriction was void. The plaintiff's counsel then urged, that the plaintiff, at all events, was entitled to a verdict upon the new assignment, because it appeared clearly upon the evidence, that the defendants, by pulling down the bank, had done more than was necessary to assert the right of common. The learned Judge left three questions to the jury; first, whether the defendants had established the right of common, of pasture, and of turbary stated in the pleas; the jury found that they had. Secondly, whether there was within the manor a custom for the lord to make grants of parcels of the waste without limit or restriction; the jury found that there was such a custom. Thirdly, whether the defendants had done more than was necessary for asserting the right of common, of pasture, and of turbary. The learned Judge, in his address to the jury upon this latter point, observed that it appeared upon the evidence that there was neither turf nor pasture upon the land in question, and that the defendants pulled down the mound, which it was not necessary for them to do in order to assert the right of common. The jury found that the defendants did more than was necessary for the purpose of asserting their right of common. The learned Judge then directed a verdict to be entered for the plaintiff for 1s. damages, but reserved liberty to the defendants to move to enter a nonsuit if the Court should be of opinion that the evidence of the custom to inclose ought not to have been received, or if that custom was void; and it was agreed that the Court should (as they thought fit) order a verdict to be finally entered for the plaintiff or the defendants on all or any
of

of the issues. *Selwyn* in *Easter* term last obtained a rule nisi for a new trial, and cited *Proud v. Hollis* (a) to show that the defendant had not done more than he was entitled to do in the exercise of his right of common, and, consequently, that the verdict for the plaintiff on the new assignment ought to be set aside. Secondly, assuming that the lord might inclose, the right to inclose, whether considered as a reserved right of the lord at the time of the grant, or a right founded on immemorial usage, ought to have been replied specially, and it ought to have been averred that a sufficiency of common was left. This course was adopted in *Duberley v. Page* (b), *Clarkson v. Woodhouse* (c), *Shakespeare v. Peppin* (d), and *Grant v. Gunson* (e). But, thirdly, the lord cannot establish such a reserved right, *Badger v. Ford* (f). It is true, that in *Rekard v. Hemmett* (g) Lord Chief Justice De Grey alludes to such a right as existing in the manor of *Hampstead*; but there it was the custom for the homage to survey the spot before the inclosure, and to make their report. But considering it as a custom, it is unlimited in its nature, and undefined in its terms; and goes to the destruction of the whole common, and, however ancient, is bad in this view of it, *Wilson v. Willas*. (h)

R. Williams and Follett for the plaintiff. The evidence of the right of the lord to make grants of the waste, was, admissible upon the issue joined on the replication. The plea is, that at the time when the trespasses complained of were committed, the defendant in

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(a) 1 B. & C. 8.

(b) 2 T. B. 391.

(c) 5 T. B. 412. n.

(d) 6 T. B. 742.

(e) 1 Taunt. 435.

(f) 3 B. & A. 153.

(g) 5 T. B. 417.

(h) 7 East, 127.

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respect of his copyhold tenement had a right of common *over the close of the plaintiff*. The replication applies to the time mentioned in the plea. The answer of the plaintiff in substance therefore is, that at the time when the trespasses were committed, the defendant had no such right of common on the plaintiff's close. Evidence shewing that the right of common was then at an end supported the issue, and the evidence of the custom for the lord to inclose was, therefore, properly received. But in fact no other issue could be raised by the replication by which the point in dispute between the parties, viz. the existence of the custom to inclose, could be tried. For it is a clear and elementary principle of pleading, that the matter constituting the ground of defence in the defendant's plea must in the replication be either confessed and avoided or traversed. Here the custom upon which the defendant says his right is founded is traversed. The plaintiff's answer to the defendant's plea in fact is, that the defendant's right of common over the plaintiff's close had, at the time *when the trespasses were committed*, been put an end to. But that could not, according to the rules of pleading, have been replied, for the mere assertion of a fact inconsistent with the matters pleaded is not sufficient. There must be a positive denial or confession of the plea; *Com. Dig. Pleader (G 2.) Covert's case (a)*. And therefore a replication setting out the custom under which the plaintiff claimed would have been bad unless it had concluded with a traverse of the custom set out in the plea. Such a replication could have been framed, but then the issue must have been the same; because an inducement to a traverse is not traversable. And, although in some cases it may be advisable, to use a

(a) *Cro. Eliz.* 754.

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special traverse in order to avoid an estoppel, or to take the opinion of the Court in an early stage of the proceedings, on the legality of the answer to the plea, it is not in any case necessary. There may be a traverse at once concluding to the country, which is the shortest and best, or there may be a special traverse with an inducement. If a party by his plea makes title by custom or prescription, the other party cannot reply another custom or prescription inconsistent with it, without a traverse. He must deny the prescription stated in the plea, and his custom or prescription will be sufficient evidence to shew that the custom or prescription stated in the plea does not exist, *Durrant v. Child (a)*; *Kenchin v. Knight (b)*. In *Spooner v. Day (c)* the plaintiff in the declaration prescribed for a right of common, the defendant pleaded a custom to inclose, and the plea was held bad, on the ground that the defendant did not traverse the prescription in the declaration, and that he could not plead a prescription against a prescription, but ought to answer the prescription alleged in the count. In *Murgatroid v. Law (d)*, the action was for diverting a watercourse; the plaintiff set out his title in the ordinary way, and a prescription that the water should flow to his close, and that defendant diverted it. The defendant pleaded in bar that he was seised in fee of his close, and that all those whose estate he had therein had been accustomed to take the water for the convenient watering of their cattle in the close. Upon general demurrer, the plea was adjudged ill, because the defendant had neither confessed and avoided, nor

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(a) Yelv. 217.
(c) Cro. Car. 492.

(b) 1 Wils. 253.
(d) Croik. 116.

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traversed the matter alleged in the declaration; but it was said that if he had pleaded the general issue, the facts stated in the special plea would have been a good answer to the action. It is therefore quite clear, that in this case the replication must have contained a denial of the right of common set out in the plea, and that if the custom to inclose alone had been replied, the replication would have been bad. In *Grant v. Ganner* (a), the defendant pleaded a common of turbary, and from the abstract of the pleadings in the printed report, the replication does not appear to have contained any traverse of the prescription; in that case, however, the right of common was claimed over the wastes of the manor, and not over the close of the plaintiff, as it is here. In *Weeks v. Sparke* (b), to trespass, quare clausum fregit, the defendant pleaded a prescriptive right of common over the locus in quo at all times for his cattle, levant and couchant. The plaintiff in his replication prescribed in right of his messuage to use the locus in quo for tillage with corn, and until the taking in of the corn, to hold and enjoy the same in every year, and *traversed the defendant's prescription*. And, therefore, where prescriptive rights are pleaded, but have been put an end to, the proper replication is not that the right has been put an end to, and for this reason, that it does not deny the plea, but the replication takes issue upon the prescription; and if there has been such a prescriptive right, and such right has been put an end to *before the trespasses were committed*, that issue must be found for the plaintiff, because the replication puts in issue the existence of the prescriptive right *at the time when the trespasses were committed*. Thus, in *Rotherham v.*

(a) 1 Taunt. 435.

(b) 1 M. & S. 679.

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Green (a), to trespass, *quod clausum fregit*; the defendant pleaded that *W. G.* was seised in fee of a tenement in *L.*, and that he and his ancestors, and all those, &c. in the said tenement from time whereof, &c. have used to have common in the place where, &c. for all their beasts levant and couchant upon the tenement; and that it descended to him, &c. Issue was taken upon the prescription, and upon the issue the plaintiff proved that *E. G.*, the grandfather of the defendant, being seised of the tenement, released to the plaintiff's ancestor all his right, and his common in part of the land where he had the common, and died, and the tenement descended to *W. G.*, and from him to the defendant; and it was adjudged for the plaintiff on the ground that the release, though only partial, was a release in law of all the right; or in other words, that the right of common had been put an end to. So where a public footway has been stopped up by an order of justices, and the owner of the soil brings trespass, and the defendant pleads the public footway, the proper form of the replication is not to reply specially the order for stopping up, but to deny that there is any such footway as that mentioned in the plea, *Davidson v. Gill (b)*.

Assuming that the evidence of the custom to inclose was admissible upon this issue, then the next and principal question is, Whether that be or be not a legal custom? First, a custom for the lord to inclose without restriction is good; for such a custom is evidence that the lord, at the time of granting the right of common, expressly reserved to himself the right to inclose. It is true, that by inclosing, the lord excludes the commoner from a portion of the common;

(a) *Cro. Eliz.* 598.(b) 1 *East*, 6.

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but so he does, if he plants trees upon the common, or if he makes clay pits, or turns in rabbits, which make coney burrows. *Batson v. Green* (a) and *Cooper v. Marshal* (b), and *Kirby v. Sadgrove* (c), shew that the lord may do all those acts. During the time the trees are growing, or the clay pits or coney burrows are open, the commoner is deprived of the use of a portion of the surface of the land. *Lord Northwick v. Stanway* (d), *Clarkson v. Woodhouse* (e), and *Folkard v. Hemmett* (f), are authorities to shew that a right for the lord to inclose may exist. But assuming that the lord can only be entitled by custom to inclose parcels of the waste, provided he leave a sufficiency of common for the commoners, there was in this case *prima facie* evidence to shew that a sufficiency of common was left; or at least the onus of proving the contrary lay on the defendant. It was proved that there were 2000 acres of waste land still left, and that the grant made in this instance was in the same form as that which had been used for 200 years. It ought not, therefore, to be presumed that the lord acted illegally; and if that be so, then there was *prima facie* evidence to shew that a sufficiency of common was left. It lay upon the defendants, who impeached the grant, to shew by evidence that it is void, because a sufficiency of common was not left. *Grant v. Gunner* (g), will be relied upon to shew that there can be no approvement in derogation of a right of common of turbary. That case only shews there can be no approvement under the statute of *Merton*. But there was not any evidence of a custom, or of any right having

(a) 5 T. R. 411.

(c) 6 T. R. 485.

(e) 5 T. R. 411.

(g) 1 Taunt. 455.

(b) 1 Burr. 259.

(d) 3 Bos. & Pul. 346.

(f) 5 T. R. 417.

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been reserved to the lord at the time when he granted the common, of making inclosures, &c. or doing other acts for his own benefit on his wastes. The replications stated that the plaintiff became seised by force of the statute. The objection that a reservation of this kind by the lord is inconsistent with the grant of the right of common, will apply equally whether the common be common of pasture or turbary. In *Badger v. Ford* (a), it was common of pasture. In improvements made under the statute of *Merton*, the party to whom the grant is made holds as a freeholder; but where the grant is by custom, the grantee takes as a copyholder. All the cases, therefore, which recognize as a valid custom the right of the lord to grant parcels of the waste as copyholds, recognize the validity of this custom, which has been treated as a valid one in *Rex v. Warblington* (b), *Doe v. Davidson* (c), *Rex v. The Inhabitants of Wilby* (d), *Rex v. Inhabitants of Hornchurch* (e). *Badger v. Ford* is the only authority against the plaintiff. That case was decided upon a motion for a new trial. The point now before the Court was not at all argued. Two points arose, and the Court refused the rule upon both grounds. And what the Lord Chief Justice there says does not apply to a case where the lord does not claim the right of annihilating the right of common altogether, but merely a right to grant, leaving a sufficiency of common to the commoner.

Assuming that the evidence of the custom to inclose was not admissible upon this issue, or that such

(a) 3 B. & A. 153.

(b) 1 T. R. 242.

(c) 2 M. & S. 184.

(d) 2 M. & S. 504.

(e) 2 B. & A. 189.

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custom itself was bad, the plaintiff, at all events, is entitled to retain his verdict on the new assignment. The lord is the absolute owner of the waste, and may convey or lease any part of it, subject to the right of common. The locus in quo, therefore, is clearly the close of the plaintiff. The declaration charges the defendants with breaking and entering the plaintiff's close, and destroying the herbage, and prostrating the fences. The defendants in their pleas say, that having occasion to use their right of common, they broke and entered the close, and destroyed the herbage, and threw down and destroyed the fences while in the exercise of that right. Then the plaintiff by his new assignment says, that the defendants, *on other occasions*, and for *different purposes* than those mentioned in the pleas, and to a greater extent, and with more force and violence than was necessary for abating and removing the supposed stoppages and obstructions in the pleas mentioned, committed the trespasses in those pleas mentioned. Now, admitting that the defendants were justified in throwing down the fences *to abate the nuisance*, they have not in their plea alleged that they did it for that purpose, and they were not justified in destroying the grass and herbage in the close, except for the purpose of exercising the right of common. They say they did it for that purpose, but the new assignment charges that they did not. The question upon the plea of not guilty is, Did they or did they not? It was clear upon the evidence, that they did not do it in the exercise of their right of common; because there was neither pasture nor turf on the place, and they had no cattle with them, nor any instrument to cut or carry away turves if there had been any; they did, therefore, commit trespasses for other purposes than

than those mentioned in the pleas. Assuming, therefore, that they were justified in throwing down these fences because they were a nuisance to their commonable rights, they have not so pleaded it in those pleas; and, therefore, upon this part of the new assignment, there must, at all events, be a verdict for the plaintiff. Moreover, the defendants were not justified in throwing down and totally destroying the fences, although the fences might be an injury to their rights of common. Their proper remedy was an action upon the case against the lord. In *Sadgrove v. Kirby* (a), it was held that a commoner could not justify cutting down trees planted by the lord on the waste, although there was not a sufficiency of common left, but that his remedy was by action on the case or by assize.

Serjt. *E. Lawes* and *Schwyn*, contra, were desired by the Court to confine their argument to the point on the new assignment. The true meaning of the new assignment is, that the defendant committed trespasses unconnected with the right of common claimed in the pleas. If, therefore, the pulling down the fence by the defendant was an act which he was authorized to do in assertion of that right of common, then it was not done for other purposes than those mentioned in the pleas, and the plaintiff ought not to have any verdict upon the new assignment. Now here the erecting the fences upon the common was not only an injury to the commoner, but an act illegal in its own nature, and consequently a nuisance of that description which the commoner was entitled to abate. *Bracton*, liber 4. chap. 37, takes a distinction between what he calls

(a) 6 T. R. 485.

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nocumentum justum and *nocumentum injuriosum*; and he defines *nocumentum injuriosum* to be, where a person does something in itself unjustly against law; and *nocumentum justum* to be, where the act is just in itself, but causes damage to another. This distinguishes the present case from those where the lord has either planted trees on the common, or stocked it with rabbits. An act of this kind, the lord, as owner of the soil, has a right to do; and though it may prove injurious to the commoners, yet it is what the law deems *nocumentum justum*, and only becomes *nocumentum injuriosum* by excess. In the case of the *nocumentum injuriosum*, the commoner may abate the nuisance; but where it is *nocumentum justum*, and becomes injuriosum by the excess, he must bring his action. The authorities shew that the defendants had a right to destroy the whole of the fence, in the exercise of the right of common. In *Bro. Abr. tit. Common*, pl. 93 this is laid down, "Where I have common in another's land, and the owner makes a hedge on the land where the common is, I may break down the whole hedge; but if he incloses the whole land in which the common is, by making a hedge on other land which surrounds the land in which the common is, I may not break down the whole hedge, but only part, so as to have a way to the land where the common is; and this is the diversity;" and the Year Book 15 H. 7. 10 b. is cited. On reference to the Year Book, it appears to have been held *per Curiam*, "If I have common appendant, &c. and he who hath the land makes a hedge on the land whence the common issues, I may break down the whole hedge; although the common be appendant, yet the lord may approve a parcel." The other part of the report in the

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Year Book is literally the same as in *Brooke*. In *Bro. tit. Common*, pl. 8., it is laid down, "that where the common is appendant, the owner may approve certain parcel, et hoc videtur esse relinquant al comminere suff. comun." In 2 *Inst.* 88. it is said, "If the lord doth inclose any part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure, because it standeth upon the ground which is his common." In *Mason v. Casar* (a), which was trespass for breaking down hedges, the issue was, Whether the defendant could enjoy the common tam amplo modo? and there was a verdict for the defendant. The Court were of opinion, "that the defendant might abate the hedges, for thereby he did not meddle with the soil, but only pulled down the erection." In this case it is admitted on the pleadings, that the defendant did not enjoy tam amplo modo, and he has only levelled the banks. In *Cooper v. Marshal* (b), the distinction between surcharging the common, and a total obstruction of it, is noticed by the Court. Lord *Mansfield* there lays it down, that in the one case the commoner is driven to his action, in the other he may abate; and *Foster J.* there says, that an abatement of a nuisance occasioned by a lord's inclosing, is only a restoring that right which the lord had before granted, and is, therefore, justifiable; but in the case of an excess (by surcharging a common with rabbits), the law is to judge of the measure of it.

BAYLEY J. I think that the rule for a new trial ought to be made absolute. The question upon which I have entertained the greatest difficulty during the argument is, whether the plaintiff is entitled to retain his

(a) 2 *Mut.* 65.

(b) 1 *Burr.* 259. 2 *Kington*, 1.

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verdict upon the new assignment? and upon the whole I think that he is not. The authorities cited from *Brooke's Abridgment* and the Year Book satisfy my mind, that where a fence has been erected upon a common, inclosing and separating parts of that common from the residue, and thereby interfering with the rights of the commoners, the latter are not by law restrained, in the exercise of those rights, to pulling down so much of that fence as it may be necessary for them to remove for the purpose of enabling their cattle to enter and feed upon the residue of the common, but that they are entitled to consider the whole of that fence so erected upon the common as a nuisance, and to remove it accordingly. Those authorities shew that there is an essential distinction between this case and that of *Sadgrove v. Kirby* (a). The fences placed upon the common in this case were, *primâ facie*, as against the commoners, wrongfully and illegally placed there, and a nuisance which they might abate; but the trees growing upon the common, in *Sadgrove v. Kirby*, were not, *primâ facie*, illegally growing there; for the lord, as owner of the soil had, *primâ facie*, a right to plant and to have those trees there; and the trees would not become wrongful as against the commoners, unless it were by their injuring their easement, and not leaving them a sufficiency of common for their cattle. The lord, by granting rights of common upon his waste, does not thereby exclude himself or his tenants from all use of the waste on which the right of common is to be exercised, but merely grants to others, in common with himself and his tenants, certain rights upon that waste. All that the lord has not granted remains in him. He

(a) 6 T. R. 483.

may

may therefore apply the waste to any purposes not inconsistent with the rights which he has previously granted to the commoners. One mode by which he may make his waste beneficial to himself is, by planting trees on it. They may also be beneficial to the commoners, by affording shade to the cattle at particular periods of the year. He may also exercise his right by turning in rabbits, provided he leave a sufficiency of common for the commoners. The turning rabbits on the common is an act not *primâ facie injuriosum*. It is *primâ facie* in the exercise of his legal rights, as owner of the soil. It was therefore properly decided, in *Sadgrove v. Kirby* (a), and *Cooper v. Marshal* (b), that a commoner in such a case is not to take upon himself to decide that the trees or rabbits on a common are a nuisance, and to cut the trees down or destroy the rabbits, but that he is bound in the first instance to bring his action, and to establish to the satisfaction of a jury they are a nuisance. If that be a sound distinction between those cases and the present, what was the principle upon which the verdict was given for the plaintiff on the new assignment? The jury seem to have been of opinion, that the defendant had done more than was necessary for the purpose of asserting the right of common; and if the decision in *Sadgrove v. Kirby* were to govern the present case, and the erection of the fence were an act which the lord and his grantee *primâ facie* had a right to do, the defendants would have done more than was necessary for the purpose of using the right of common, if they had pulled down any part of the bank or fence, because there was an opening by which they might have entered upon the plaintiff's

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(a) 6 T. R. 483.

(b) 1 Burr. 259.

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close; but if the whole of that bank or fence were a *documentum injuriosum*, which the defendants, in the exercise of their rights of common, were justified in removing, the verdict of the jury, that they had done more than was necessary for the purpose of asserting their rights, could not be well founded. It seems to me, that the verdict upon the new assignment was founded upon the notion, that the defendants, in pulling down the fence, had done something more than they had a right to do in asserting their rights of common. But the authorities shew, that they had not done more than by law they were entitled to do. I think, therefore, that the jury were not warranted in coming to the conclusion, that the defendant entered the close for *other purposes* than those mentioned in the pleas, and that the verdict for the plaintiff upon the new assignment is not warranted by the evidence.

The next question is, Whether the plaintiff be entitled to recover, on the ground that he has proved a custom for the lord to inclose parcels of the waste? and that raises the great question in this case, Whether the lord had any such right? The lord had granted to the plaintiff a particular spot, parcel of a large waste. The defendants had a right of common on the waste, including the space of land granted to the plaintiff, unless that spot had been legally separated from the residue of the maner by the lord. I have no difficulty in saying, that if it were legally separated, the plaintiff had a sufficient possession to entitle him to maintain trespass. The possession of the whole waste, notwithstanding the right of common, remains in the lord; and if he, in the manner warranted by the custom, transfers the possession to the plaintiff, and the latter enters, then he becomes

comes possessed, and acquires a lawful possession, as against the lord; and the right of the commoners to turn their cattle over that land, as well as the residue of the waste, is perfectly consistent with the right of possession being yeated and perfected in him.

Then, as to the right of the lord to inclose the land in question, and to grant a perfect title to the plaintiff, it was insisted, first, that the lord had an unlimited and unrestricted right, (founded upon a custom in this particular manor,) to abridge the rights of the commoners, and to confer in severalty, upon any person from time to time, such portions of the waste as he in his discretion should think fit; it seems to me, that such a right is utterly inconsistent with an existing right of common; for the lord might by degrees inclose the whole of the waste, and so annihilate the right of the commoners. *Badger v. Ford* (a) is an authority upon that point; but had there been no authority, I should have thought, that where-ever it is once established that a right of common has existed from time immemorial, such a privilege or custom in the lord cannot by law be supported, because it would be in destruction of that right of common. All the authorities which have been cited in support of such a right are distinguishable from the present case. The right claimed is to sever and take away permanently from the common a beneficial part of it; so as to deprive the commoner of any power or right over that part. In *Bateson v. Great* (b) there had been from time immemorial a usage for the lord to dig clay upon the waste; and that was held to be evidence to show, that when he granted out the right of common to the commoners he reserved to himself the right of

(a) 5 T. R. 411. (b) 5 T. R. 411.

digging

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digging clay. The extent to which it had been carried in that case did not appear to be unreasonable. Lord *Kenyon*, in delivering judgment, intimated that there was no evidence to shew that the right had been more exercised of late years than formerly. Now the lord, by digging for clay, takes from the land a product of a particular species, but the land afterwards remains capable of yielding food fit for the feeding of cattle. Indeed it frequently happens, that land, besides the support which it yields for the food of man or of cattle, has within it some valuable product, as marl or limestone, which it is desirable for the owner of the waste to obtain; and it is not unreasonable that the lord of a manor, when he grants rights on that land, should reserve to himself the right of taking such marl or limestone. But when he takes them, he does not permanently deprive the commoners of that benefit which they are entitled to derive from the surface of that part of the land from which the marl or limestone is so taken. A case of that sort is distinguishable from the present, because the lord still leaves for the benefit of the commoner something capable of yielding food for his cattle. The user of the privilege by the lord from time to time is evidence to shew that he reserved that right to himself; and the nature of the substance which is taken from the earth shews that such reservation was not unreasonable. The exercise of such a right will no doubt interfere with the privilege of the commoners during the time the produce is taken from the earth, and until the surface reproduces pasturage. But the distinction between that case and the present is, that here the commoner is wholly and permanently deprived of the benefit of a quantity of land, whereas in that

case

case the land was only taken away for a certain period. The case of *Clarkson v. Woodhouse* is distinguishable from the present. The question in that case was on the record, and came on for argument on motion in arrest of judgment. That was an action of trespass for breaking and entering the plaintiff's close in *Stalmine*, in the county of *Lancaster*. The defendant by his pleas claimed, in right of an ancient messuage in *Stalmine*, common of pasture and of turbary. The plaintiff relied upon a grant of parcel of the waste. The right claimed by the defendant would be exercised on those portions of the waste which yielded pasture and turbary respectively. When the grants of common were first made, it is probable that pasturage would be confined to those places which yielded pasture, and that that quantity was deemed sufficient for the cattle of all the commoners. The right stated in the replication was, not to withdraw from the commoners any portion of the pasture or turf land, but that the owner should assign to particular individuals a particular portion of moss land, and that they should work upon that, and not elsewhere, until all the turbary should be exhausted, and then that the owner might inclose. The words are, "So long as any turbary remained or should remain in such respective moss-dales; and when and so often as the turbary of such moss-dales so assigned, &c. had been got and cleared therefrom by such digging and getting of turves for the purposes aforesaid, the owners of the said waste for the time being, for all the time whereof, &c. had inclosed and approved, &c. to themselves all such moss-dales or parts of the said waste called *Stalmine Moss* as had been or should be cleared, to hold the same so inclosed at their pleasure in severalty for ever afterwards, freed and discharged

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discharged from all common of pasture and turbary thereon." The fair meaning of the custom to inclose stated upon that record seems to me to be that when the land was exhausted and incapable of producing any more turf, the owner of the same might inclose; for until it was so rendered incapable of yielding more turf, it could not be truly said that the turbary was all got and cleared therefrom; and if that be the true meaning of the custom there stated, then it only amounts to this, that when particular portions of the land which have been destined for turbary ceased to have the power of producing turbary, the owner should be at liberty to take that portion to himself. That case, therefore, is distinguishable from the present, because the owner of the waste there did not take away from the commoners any thing which had been originally appropriated to them for the purposes of pasture or turbary. In *Folkard v. Hemmett* (a), the grant of the soil was made by the lord with the consent of the homage. Now the homage are persons associated together at the lord's court (at which all the tenants of the manor may attend to act as between the lord and his tenants. Being tenants themselves, it is not very likely that they will lean towards the lord, and if the homage say, therefore, that a grant shall be made (assuming that the lord has a right to grant wherever there is more land than is necessary for the purpose of the commoners), it may be reasonably presumed, that the homage have given their consent to the grant only when it is clear that the land granted may be taken by the grantor, without interfering with the rights of the commoners; and, on the other hand, it may be fairly presumed that the homage would never consent

(a) 5 T. R. 417.

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to any part of the common being taken away from the tenants, unless they were satisfied that sufficient remained for the commoners. That case, therefore, is distinguishable from the present: there, the grant was made with the consent of the homage; here, it is done by the act of the lord himself.

I have no difficulty in saying that, in my judgment, the lord has rights of his own reserved upon the waste; I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common, and to every benefit to be derived from the soil, not inconsistent with the rights of commoners. And when it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes. That is the principle, upon which the statute of *Merton* is founded. The lord has a right to approve, not as lord, but as owner of the soil. *Giles v. Hove* (a) shews that the owner of the soil, whether lord or not, may make such an approvement. It seems to me that the lord's right is this: he may approve, provided he leave sufficiency of common of pasture for all the cattle which are entitled to feed upon it. The common may originally have been destined for a definite number of cattle, or for all cattle levant and couchant upon certain lands. Many of those rights may be extinguished, or the common itself may produce so much more herbage, that a smaller portion of that common may be sufficient for depasturing the cattle of the persons entitled, than when it was originally destined

(a) 5 T. R. 445.

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to that purpose. Now, whenever that is the case, I think that the lord has a right to inclose; but in order to justify making the inclosure, it is incumbent upon him or his grantee, when the right to inclose is questioned, to shew that there is sufficiency of common left (a). In all the cases in which the right of the lord to inclose has been stated on the record, there has been an allegation that he left sufficient common for the commoners. That was so in *Glover v. Lane* and in *Grant v. Gannar* (b). The commoner has a certain right over the whole of the waste; and when the lord abridges that right, he ought to shew that he has done that which the law requires him to do before he abridges the right of the commoner. And, therefore, I am of opinion, that in this case, it ought to have been submitted to the jury whether there was or was not, at the time when the lord made the grant of the locus in quo, a sufficiency of common left for all the persons having rights of common upon the waste in question. The right of the lord to inclose must depend on the finding of the jury on that question. It is impossible for this Court, without knowing what the fact is, to say, whether the verdict ought to be entered for the plaintiff or defendants.

It is not necessary to give an opinion upon the question, whether there can be any approvement against a right of common of turbary. There are, undoubtedly, authorities to shew that the owner of the soil, generally speaking, cannot approve against such a right. In the manor, however, numerous instances of an exercise of the right have been shewn, and in all those instances,

(a) *Smith v. Feverell*, 2 Mod. 6.

(b) 1 Taunt. 435.

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persons having the right of common of turbary must have been excluded from the parts inclosed. These inclosures having been always submitted to, may establish that, at least in this manor, the right to approve does exist, and I think that such right may reasonably exist. Common of turbary must be enjoyed in respect of ancient messuages. Many of those ancient messuages may be destroyed and others not substituted, and it would be unreasonable that the whole of a waste should remain uninclosed so long as a single commoner in respect of an ancient messuage should continue to have a right to cut turves on the common. Without giving any distinct opinion on that point, it seems to me, that in this case, there was sufficient evidence, of a custom for the lord to inclose, to take this out of the general rule which is laid down with respect to common of turbary; and that, as against the common of turbary in this case, the lord may have a right to inclose. But, inasmuch as the question, whether a sufficiency of common of turbary or pasture was left for the commoner, and whether the turbary left was sufficiently near and convenient to that messuage in respect of which the right is claimed, has not been submitted to the jury, I think that there ought to be a new trial.

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HOLROTH J. I am of the same opinion. The cases of *Salegny v. Kirby* (a) and *Cooper v. Marshal* (b) induced me to think for a considerable period that the defendants had done more than they were justified in doing in order to use the right of common, because as the inclosure was not completed, they might have entered

(a) 6 T. R. 483.

(b) 1 Burr. 259.

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upon the locus in quo to exercise their right of common without throwing down the embankment; or even if the whole space had been inclosed, I thought that they would have been justified only in making an opening to enable them to enter and exercise the right of common upon the locus in quo. But the authorities cited have satisfied my mind that where fences are wrongfully erected upon land, subject to a right of common, the commoner in exercising his right is not restricted to pulling down so much of the fence as it may be necessary for him to remove in order to enter upon the locus in quo, but that he may remove the *nocumentum injuriosum*. I think, therefore, that the commoner in this case had a right to remove the whole of the fences, so as to restore to himself that right of common which might be injured by their continuance. If that point had not been so established by the authorities, I think that the commoner would have had a right to do no more than restore himself to the situation of exercising his right of common, and that he might have done so without pulling down the fences.

With respect to the right of the lord, I cannot accede to the doctrine that he can have an unlimited right by custom to inclose common. I think that such a custom would be void, because it would go to the destruction of the right of the commoners altogether. It would be inconsistent with that right, and with the grant, which from the usage and custom must be presumed to have been made to the tenants or persons entitled to the right of common. The cases of *Bateson v. Green* (a), *Clarkson v. Woodhouse* (b), and *Folkard v. Hemmets* (c),

(a) 5 T. R. 411.

(b) 5 T. R. 412. note.

(c) 5 T. R. 417.

THE R. & A. (a)

are distinguishable from the present, for the reasons given by my Brother *Bayley*. In *Bateson v. Green* the lord was exercising, not, strictly speaking, a right of common (because the act done was upon his own soil), but a right of getting the soil for his own benefit, and thereby enjoying that fair share of the land with the other persons having the right of common. In that case, it appeared in evidence that the lord had been accustomed for seventy years to dig clay-pits, which were of great size, and were not filled up again; and that if no pits had been dug, there was not sufficient common for the number of commoners. The question considered by the Court was, whether the right of the lord to dig for clay was subservient to that of the commoners or not, and the Court decided that the custom shewed the right of the commoner to be subservient to that of the lord; and that the latter, therefore, had a right to dig clay to the extent to which he had been used to do it, although the right of the commoner was thereby abridged. That is a very different thing from taking the land from the commoners for all purposes, and depriving them of any benefit of it. The case of *Clarkson v. Woodhouse* (a) is distinguishable from this upon the same principle; and the case of *Folkard v. Hemmett* (b) upon the ground that the right of inclosure could not be exercised without the consent of those persons whose rights would be affected by such inclosure, and, therefore, if there was a consent by them, it would be conclusive, not only against them, but against those whom they represented at the time when they consented to the grant. The exercise of the right

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(a) 5 T. R. 411.

(a) 5 T. R. 411.

(a) 5 T. R. 417.

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to build may have been injurious to the commoners, but they may have received compensation for any injury which they thereby sustained. That does not apply to a case where the lord claims by custom the right to inclose and take from the common any part of the waste, whether it be injurious to the commoners or not. I incline to think that the lord may by custom be entitled to grant parcel of the waste, even as against common of turbary; but this, his right, must be subservient to, and not injurious to the rights of the commoners. If it be not injurious to the rights of the commoners, the lord from whom their interest is derived may reasonably make use of a part of the waste, and his so doing ought not to be *prima facie* considered an injury to them, but if he goes beyond that, and grants so much of the waste as to be injurious to the rights of common, I think that that is inconsistent with the grant of common, and, therefore, a custom for the lord to make a grant of the waste to that extent, would be bad. But a right by the lord to grant parcels of the waste, leaving a sufficiency of common for the commoner, may exist upon the grounds stated by my brother *Bayley*, both as against common of pasture and common of turbary. The cases seem to shew, that without a custom there cannot be an approvement against a common of turbary; but I think that they do not establish that such a power of approvement may not exist by custom. Upon these grounds I think that there should be a new trial.

LITTLEDALE J. It seems to me that the form of the plaintiff's replication is correct, and that it was not necessary for him to set out a custom to inclose generally,

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on leaving a sufficiency of common, but that on the issue joined upon the custom, the plaintiff was entitled to give evidence to shew that the right of common no longer existed. The defendant in his plea alleges, that from time immemorial there hath been *and still is* a custom to have common upon the locus in quo. It lies upon him to prove the whole of that allegation. The plaintiff may, therefore, shew that at the present day, by lawful inclosure or otherwise, the custom to have common upon the locus in quo no longer exists. I am, therefore, of opinion, that the evidence of the custom for the lord to inclose was admissible to negative the allegation in the plea that there still is a custom to have common upon the locus in quo.

It seems to me, that a general custom for the lord of the manor to take in parts of the waste, cannot be supported, for the reasons already given by my Brother Bayley. If such a custom were valid, the lord might by degrees take away the whole of the rights of the commoners; but I see no objection to a custom for the lord to make inclosures from time to time, leaving a sufficiency of common. Such an inclosure could not be made in the present case under the statute of *Merton*, because by that statute, the improvements which take place must be of freeholds. Here the custom alleged is, to inclose copyholds to be granted according to the custom of the manor. The right claimed by the plaintiff cannot therefore be maintained, except by special custom. The statute of *Merton* authorizes the lord to inclose, leaving a sufficiency of common of pasture; and where there is a custom to inclose copyhold lands, I think that custom ought reasonably to be subject to the restriction imposed by the statute of *Merton* as to freehold lands.

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against
Barron

lands. There should, therefore, be left a sufficiency of common, and if there be a right to inclose against common of turbary (upon which I pronounce no opinion), there ought also to be sufficient for common of turbary left. Assuming that there can be no right to inclose without leaving a sufficiency of common, I think the burden of proving that a sufficiency of common has been left lies on the plaintiff. It has been contended, that as he has put in several grants of parcels of the waste on which inclosures have been made, it ought to be presumed that the lord has a right to inclose, until the contrary be shewn. But it seems to me, that it lies on the lord, or the persons claiming under him, to shew that a sufficiency of common is left. Where the lord approves under the statute of *Merton*, he shews a sufficiency of common left. In the present case it is said that as the right does not depend upon any statute, a different consideration may be applied to it; but I think not. For when the lord is apparently abridging the right of the commoner by making an inclosure, it lies upon him to shew, that although that right is apparently injured, it is not really injured. I think, therefore, that the burden probandi lay upon the plaintiff who represented the lord. That question has not been submitted to the jury, and the plaintiff has not proved that there was a sufficiency of common left. As for, indeed, as relates to the common of turbary, there was one witness who stated that there was plenty of turf left upon the waste; but the plaintiff ought to have shewn, not merely that there was a sufficient quantity left upon the waste, but that the turbary left was such that persons who have the right may conveniently get at it; for it makes a great difference to a commoner, whether

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**ALLERT
against
ELLIS.**

shal (a) are quite different. There, the lord did what was necessary for the enjoyment of the waste, by having trees and rabbits there. In *Sadgrove v. Kirby*, (reported in 1 *Bds. & Pds.* 13.) Mr. Justice *Buller* observed, that *Mason v. Caesar* (b) was decided on the point, that the hedge was no part of the soil, and, therefore, he at that time recognised the right to pull down part. None of these cases, therefore, affect the authority of the more ancient cases cited from *Brooke's Abridgement* and the *Year-book*, and there does not appear to be any reason why the commoner should not pull down the whole. It might be a great injury to the commoner to have fences set up on a common in different places, and although he might bring an action for the obstruction, yet he is in this, as in other analogous cases, entitled to abate the nuisance, and that is much more convenient than that he should bring an action for every obstruction; because, when the fences are thrown down, the question of right may be decided in one action. For these reasons I am of opinion, that the defendant was justified in what he did, and that the verdict of the jury upon the new assignment cannot be sustained. There must, therefore, be a new trial.

Rule absolute for a new trial.

(a) 1 *Burr.* 259. and 2 *Wils.* 51.

(b) 2 *Mod.* 65.

1827.

**BERNASCONI and Others against FAIRBROTHER
and WINCHESTER, Sheriffs of MIDDLESEX, and
HENRY WILTON.**

A RULE had been obtained in a former term, for staying the return to a writ of fieri facias issued at the suit of *Wilton* (one of the defendants in this case) against the goods of one *Chambers*, a bankrupt, until the sheriff should be indemnified, the assignees of *Chambers* and *Wilton* having refused such indemnity. The plaintiffs, who were the assignees of *Chambers*, brought, in their own names, and not as assignees, the present action of trespass against the sheriff and *Wilton*, for seizing those goods under the judgment and execution issued against *Chambers*. The property upon which the defendants had levied, was part of a farming stock at *Enfield*, formerly belonging to the bankrupt, against whom a commission had issued in November 1826, and under which *Bernasconi* and others had been chosen assignees in 1826. The assignees took possession of this farm and stock, and managed it for the benefit of the creditors, and they had purchased some additional stock and farming utensils. After they had been in possession some months, *Wilton* issued the execution above mentioned, when the rule before stated was made by the Court. A motion was made for staying the proceedings in this action also; and it appeared by the affidavits that *Chambers* was disputing his commission

The sheriff having, under a fieri facias, issued at the suit of a judgment creditor, seized the goods of a bankrupt, which the assignees claimed, the Court stayed the return of the fieri facias until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution creditor for seizing the goods, which consisted of the stock on a farm, which had belonged to the bankrupt. On the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased

additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff under the fieri facias. The Court refused to stay the proceedings in the action of trespass.

with

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BREWSTER &
FARRINGTON.

with the assignees, and had petitioned the Chancellor to supersede it. A rule nisi was obtained; first on the ground that the sheriff ought not to have been made a party to the action, as he acted in obedience to the writ delivered to him; and, secondly, that the prosecution of this action was in violation of the rule to stay the return of the fieri facias until the sheriff should be indemnified.

F. Pollock now shewed cause. Generally speaking, the sheriff is entitled to an indemnity where the property is claimed by adverse parties, such as a judgment creditor and assignees of a bankrupt. But when, as in the present case, the assignees, by the consent of the creditors, have taken possession of the bankrupt's stock, have renewed part of the stock, and have added property of their own, the assignees have a right to maintain their possession and to bring trespass against any person disturbing it. The action now brought is in their own names, and upon their own title, and has nothing to do with the antecedent possession and property of *Chambers*. It was lawful for the assignees, with the consent of the creditors, to carry on the business of the bankrupt. There was a notorious change of possession, and the sheriff should not have been induced by the representation of the judgment creditor to levy on the goods. A motion like the present is of the first impression, and the effect of it, if successful, will be to deprive a party of a remedy to which he is entitled by law.

Holt contra. In granting these indemnities the Court always acts upon the principle of saving the sheriff and the parties the expense of a bill of interpleader in a court of equity. It regards the sheriff as a mere ministerial

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ACTS
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ministerial officer, having to perform an onerous and responsible function without any personal interest in the matter. *Chambers* is disputing his commission with the assignees. He has petitioned the Lord Chancellor for relief, and the bankruptcy has never been established in a court of law by legal trial and verdict. On the one hand, the judgment-creditor calls upon the sheriff to execute the writ, and points out property in possession of the bankrupt previous to the commission. He threatens the sheriff with an action if he does not levy; and the assignees, on the other hand, bring the present action on the ground that *he has levied*. This is a case, therefore, in which the sheriff ought to be indemnified, otherwise he will be made the instrument of the parties, and will have to try at his own expense, in the present action, the validity of the commission against *Chambers*. He cited *Cooper v. Chitty (a)*, *Raines v. Nelson (b)*, *James v. Terry (c)*, *McGeorge and Others, Assignees, v. Birch (d)*, *Ledbury v. Smith (e)*.

LORD TENTERDEN C.J. The Court will give the sheriff all the protection due to a public officer when he acts bona fide within the scope of his duty; and, as between the sheriff, a judgment creditor, and the assignees of a bankrupt, it will always take care that the sheriff shall not be made an instrument of trying at his own expense the validity of a commission. In such cases the course has been always to interfere when the sheriff has come promptly, and has acted in the straight course of his duty, indifferently and equally between the

(a) 11 B. & C. 147, 65. (b) 2 B. & C. 118.

(c) 11 B. & C. 1057.

(d) 4 Taunt. 585.

(e) 1 Chit. Rep. 294.

parties, &c.

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BERNASCONI
 against
FAIRBROTHER.

parties, and to administer to the sheriff all the equity which a court of equity could give him upon a bill of interpleader, and this has been uniformly done upon motion. But the present is a very different case. If we were to stay this action of trespass, we should take from the plaintiffs that ordinary protection to which they are by law entitled. In the first place, the plaintiffs do not bring this action in their character of assignees, but upon their own possession. If they had such assignees affirming the commission, it would have opened another consideration. They claim the property legally as their own, though they act as trustees for the general creditors. *Chambers* became a bankrupt in 1825, and the plaintiffs were chosen assignees immediately afterwards. They have been in possession of the firm and stock ever since; they have renewed part of the stock, and have brought in fresh stock of their own. After such a possession the sheriff is to be deemed, *prima facie*, a trespasser if he levies upon it. He may, perhaps, be able to defend himself in the present action, by shewing that the commission against *Chambers* is invalid, but even such a case would only protect him as to the seizure of stock which had previously belonged to *Chambers*. This rule must therefore be discharged.

Rule discharged. ¹⁰ ¹¹ ¹² ¹³ ¹⁴ ¹⁵ ¹⁶ ¹⁷ ¹⁸ ¹⁹ ²⁰ ²¹ ²² ²³ ²⁴ ²⁵ ²⁶ ²⁷ ²⁸ ²⁹ ³⁰ ³¹ ³² ³³ ³⁴ ³⁵ ³⁶ ³⁷ ³⁸ ³⁹ ⁴⁰ ⁴¹ ⁴² ⁴³ ⁴⁴ ⁴⁵ ⁴⁶ ⁴⁷ ⁴⁸ ⁴⁹ ⁵⁰ ⁵¹ ⁵² ⁵³ ⁵⁴ ⁵⁵ ⁵⁶ ⁵⁷ ⁵⁸ ⁵⁹ ⁶⁰ ⁶¹ ⁶² ⁶³ ⁶⁴ ⁶⁵ ⁶⁶ ⁶⁷ ⁶⁸ ⁶⁹ ⁷⁰ ⁷¹ ⁷² ⁷³ ⁷⁴ ⁷⁵ ⁷⁶ ⁷⁷ ⁷⁸ ⁷⁹ ⁸⁰ ⁸¹ ⁸² ⁸³ ⁸⁴ ⁸⁵ ⁸⁶ ⁸⁷ ⁸⁸ ⁸⁹ ⁹⁰ ⁹¹ ⁹² ⁹³ ⁹⁴ ⁹⁵ ⁹⁶ ⁹⁷ ⁹⁸ ⁹⁹ ¹⁰⁰ ¹⁰¹ ¹⁰² ¹⁰³ ¹⁰⁴ ¹⁰⁵ ¹⁰⁶ ¹⁰⁷ ¹⁰⁸ ¹⁰⁹ ¹¹⁰ ¹¹¹ ¹¹² ¹¹³ ¹¹⁴ ¹¹⁵ ¹¹⁶ ¹¹⁷ ¹¹⁸ ¹¹⁹ ¹²⁰ ¹²¹ ¹²² ¹²³ ¹²⁴ ¹²⁵ ¹²⁶ ¹²⁷ ¹²⁸ ¹²⁹ ¹³⁰ ¹³¹ ¹³² ¹³³ ¹³⁴ ¹³⁵ ¹³⁶ ¹³⁷ ¹³⁸ ¹³⁹ ¹⁴⁰ ¹⁴¹ ¹⁴² ¹⁴³ ¹⁴⁴ ¹⁴⁵ ¹⁴⁶ ¹⁴⁷ ¹⁴⁸ ¹⁴⁹ ¹⁵⁰ ¹⁵¹ ¹⁵² ¹⁵³ ¹⁵⁴ ¹⁵⁵ ¹⁵⁶ ¹⁵⁷ ¹⁵⁸ ¹⁵⁹ ¹⁶⁰ ¹⁶¹ ¹⁶² ¹⁶³ ¹⁶⁴ ¹⁶⁵ ¹⁶⁶ ¹⁶⁷ ¹⁶⁸ ¹⁶⁹ ¹⁷⁰ ¹⁷¹ ¹⁷² ¹⁷³ ¹⁷⁴ ¹⁷⁵ ¹⁷⁶ ¹⁷⁷ ¹⁷⁸ ¹⁷⁹ ¹⁸⁰ ¹⁸¹ ¹⁸² ¹⁸³ ¹⁸⁴ ¹⁸⁵ ¹⁸⁶ ¹⁸⁷ ¹⁸⁸ ¹⁸⁹ ¹⁹⁰ ¹⁹¹ ¹⁹² ¹⁹³ ¹⁹⁴ ¹⁹⁵ ¹⁹⁶ ¹⁹⁷ ¹⁹⁸ ¹⁹⁹ ²⁰⁰ ²⁰¹ ²⁰² ²⁰³ ²⁰⁴ ²⁰⁵ ²⁰⁶ ²⁰⁷ ²⁰⁸ ²⁰⁹ ²¹⁰ ²¹¹ ²¹² ²¹³ ²¹⁴ ²¹⁵ ²¹⁶ ²¹⁷ ²¹⁸ ²¹⁹ ²²⁰ ²²¹ ²²² ²²³ ²²⁴ ²²⁵ ²²⁶ ²²⁷ ²²⁸ ²²⁹ ²³⁰ ²³¹ ²³² ²³³ ²³⁴ ²³⁵ ²³⁶ ²³⁷ ²³⁸ ²³⁹ ²⁴⁰ ²⁴¹ ²⁴² ²⁴³ ²⁴⁴ ²⁴⁵ ²⁴⁶ ²⁴⁷ ²⁴⁸ ²⁴⁹ ²⁵⁰ ²⁵¹ ²⁵² ²⁵³ ²⁵⁴ ²⁵⁵ ²⁵⁶ ²⁵⁷ ²⁵⁸ ²⁵⁹ ²⁶⁰ ²⁶¹ ²⁶² ²⁶³ ²⁶⁴ ²⁶⁵ ²⁶⁶ ²⁶⁷ ²⁶⁸ ²⁶⁹ ²⁷⁰ ²⁷¹ ²⁷² ²⁷³ ²⁷⁴ ²⁷⁵ ²⁷⁶ ²⁷⁷ ²⁷⁸ ²⁷⁹ ²⁸⁰ ²⁸¹ ²⁸² ²⁸³ ²⁸⁴ ²⁸⁵ ²⁸⁶ ²⁸⁷ ²⁸⁸ ²⁸⁹ ²⁹⁰ ²⁹¹ ²⁹² ²⁹³ ²⁹⁴ ²⁹⁵ ²⁹⁶ ²⁹⁷ ²⁹⁸ ²⁹⁹ ³⁰⁰ ³⁰¹ ³⁰² ³⁰³ ³⁰⁴ ³⁰⁵ ³⁰⁶ ³⁰⁷ ³⁰⁸ ³⁰⁹ ³¹⁰ ³¹¹ ³¹² ³¹³ ³¹⁴ ³¹⁵ ³¹⁶ ³¹⁷ ³¹⁸ ³¹⁹ ³²⁰ ³²¹ ³²² ³²³ ³²⁴ ³²⁵ ³²⁶ ³²⁷ ³²⁸ ³²⁹ ³³⁰ ³³¹ ³³² ³³³ ³³⁴ ³³⁵ ³³⁶ ³³⁷ ³³⁸ ³³⁹ ³⁴⁰ ³⁴¹ ³⁴² ³⁴³ ³⁴⁴ ³⁴⁵ ³⁴⁶ ³⁴⁷ ³⁴⁸ ³⁴⁹ ³⁵⁰ ³⁵¹ ³⁵² ³⁵³ ³⁵⁴ ³⁵⁵ ³⁵⁶ ³⁵⁷ ³⁵⁸ ³⁵⁹ ³⁶⁰ ³⁶¹ ³⁶² ³⁶³ ³⁶⁴ ³⁶⁵ ³⁶⁶ ³⁶⁷ ³⁶⁸ ³⁶⁹ ³⁷⁰ ³⁷¹ ³⁷² ³⁷³ ³⁷⁴ ³⁷⁵ ³⁷⁶ ³⁷⁷ ³⁷⁸ ³⁷⁹ ³⁸⁰ ³⁸¹ ³⁸² ³⁸³ ³⁸⁴ ³⁸⁵ ³⁸⁶ ³⁸⁷ ³⁸⁸ ³⁸⁹ ³⁹⁰ ³⁹¹ ³⁹² ³⁹³ ³⁹⁴ ³⁹⁵ ³⁹⁶ ³⁹⁷ ³⁹⁸ ³⁹⁹ ⁴⁰⁰ ⁴⁰¹ ⁴⁰² ⁴⁰³ ⁴⁰⁴ ⁴⁰⁵ ⁴⁰⁶ ⁴⁰⁷ ⁴⁰⁸ ⁴⁰⁹ ⁴¹⁰ ⁴¹¹ ⁴¹² ⁴¹³ ⁴¹⁴ ⁴¹⁵ ⁴¹⁶ ⁴¹⁷ ⁴¹⁸ ⁴¹⁹ ⁴²⁰ ⁴²¹ ⁴²² ⁴²³ ⁴²⁴ ⁴²⁵ ⁴²⁶ ⁴²⁷ ⁴²⁸ ⁴²⁹ ⁴³⁰ ⁴³¹ ⁴³² ⁴³³ ⁴³⁴ ⁴³⁵ ⁴³⁶ ⁴³⁷ ⁴³⁸ ⁴³⁹ ⁴⁴⁰ ⁴⁴¹ ⁴⁴² ⁴⁴³ ⁴⁴⁴ ⁴⁴⁵ ⁴⁴⁶ ⁴⁴⁷ ⁴⁴⁸ ⁴⁴⁹ ⁴⁵⁰ ⁴⁵¹ ⁴⁵² ⁴⁵³ ⁴⁵⁴ ⁴⁵⁵ ⁴⁵⁶ ⁴⁵⁷ ⁴⁵⁸ ⁴⁵⁹ ⁴⁶⁰ ⁴⁶¹ ⁴⁶² ⁴⁶³ ⁴⁶⁴ ⁴⁶⁵ ⁴⁶⁶ ⁴⁶⁷ ⁴⁶⁸ ⁴⁶⁹ ⁴⁷⁰ ⁴⁷¹ ⁴⁷² ⁴⁷³ ⁴⁷⁴ ⁴⁷⁵ ⁴⁷⁶ ⁴⁷⁷ ⁴⁷⁸ ⁴⁷⁹ ⁴⁸⁰ ⁴⁸¹ ⁴⁸² ⁴⁸³ ⁴⁸⁴ ⁴⁸⁵ ⁴⁸⁶ ⁴⁸⁷ ⁴⁸⁸ ⁴⁸⁹ ⁴⁹⁰ ⁴⁹¹ ⁴⁹² ⁴⁹³ ⁴⁹⁴ ⁴⁹⁵ ⁴⁹⁶ ⁴⁹⁷ ⁴⁹⁸ ⁴⁹⁹ ⁵⁰⁰ ⁵⁰¹ ⁵⁰² ⁵⁰³ ⁵⁰⁴ ⁵⁰⁵ ⁵⁰⁶ ⁵⁰⁷ ⁵⁰⁸ ⁵⁰⁹ ⁵¹⁰ ⁵¹¹ ⁵¹² ⁵¹³ ⁵¹⁴ ⁵¹⁵ ⁵¹⁶ ⁵¹⁷ ⁵¹⁸ ⁵¹⁹ ⁵²⁰ ⁵²¹ ⁵²² ⁵²³ ⁵²⁴ ⁵²⁵ ⁵²⁶ ⁵²⁷ ⁵²⁸ ⁵²⁹ ⁵³⁰ ⁵³¹ ⁵³² ⁵³³ ⁵³⁴ ⁵³⁵ ⁵³⁶ ⁵³⁷ ⁵³⁸ ⁵³⁹ ⁵⁴⁰ ⁵⁴¹ ⁵⁴² ⁵⁴³ ⁵⁴⁴ ⁵⁴⁵ ⁵⁴⁶ ⁵⁴⁷ ⁵⁴⁸ ⁵⁴⁹ ⁵⁵⁰ ⁵⁵¹ ⁵⁵² ⁵⁵³ ⁵⁵⁴ ⁵⁵⁵ ⁵⁵⁶ ⁵⁵⁷ ⁵⁵⁸ ⁵⁵⁹ ⁵⁶⁰ ⁵⁶¹ ⁵⁶² ⁵⁶³ ⁵⁶⁴ ⁵⁶⁵ ⁵⁶⁶ ⁵⁶⁷ ⁵⁶⁸ ⁵⁶⁹ ⁵⁷⁰ ⁵⁷¹ ⁵⁷² ⁵⁷³ ⁵⁷⁴ ⁵⁷⁵ ⁵⁷⁶ ⁵⁷⁷ ⁵⁷⁸ ⁵⁷⁹ ⁵⁸⁰ ⁵⁸¹ ⁵⁸² ⁵⁸³ ⁵⁸⁴ ⁵⁸⁵ ⁵⁸⁶ ⁵⁸⁷ ⁵⁸⁸ ⁵⁸⁹ ⁵⁹⁰ ⁵⁹¹ ⁵⁹² ⁵⁹³ ⁵⁹⁴ ⁵⁹⁵ ⁵⁹⁶ ⁵⁹⁷ ⁵⁹⁸ ⁵⁹⁹ ⁶⁰⁰ ⁶⁰¹ ⁶⁰² ⁶⁰³ ⁶⁰⁴ ⁶⁰⁵ ⁶⁰⁶ ⁶⁰⁷ ⁶⁰⁸ ⁶⁰⁹ ⁶¹⁰ ⁶¹¹ ⁶¹² ⁶¹³ ⁶¹⁴ ⁶¹⁵ ⁶¹⁶ ⁶¹⁷ ⁶¹⁸ ⁶¹⁹ ⁶²⁰ ⁶²¹ ⁶²² ⁶²³ ⁶²⁴ ⁶²⁵ ⁶²⁶ ⁶²⁷ ⁶²⁸ ⁶²⁹ ⁶³⁰ ⁶³¹ ⁶³² ⁶³³ ⁶³⁴ ⁶³⁵ ⁶³⁶ ⁶³⁷ ⁶³⁸ ⁶³⁹ ⁶⁴⁰ ⁶⁴¹ ⁶⁴² ⁶⁴³ ⁶⁴⁴ ⁶⁴⁵ ⁶⁴⁶ ⁶⁴⁷ ⁶⁴⁸ ⁶⁴⁹ ⁶⁵⁰ ⁶⁵¹ ⁶⁵² ⁶⁵³ ⁶⁵⁴ ⁶⁵⁵ ⁶⁵⁶ ⁶⁵⁷ ⁶⁵⁸ ⁶⁵⁹ ⁶⁶⁰ ⁶⁶¹ ⁶⁶² ⁶⁶³ ⁶⁶⁴ ⁶⁶⁵ ⁶⁶⁶ ⁶⁶⁷ ⁶⁶⁸ ⁶⁶⁹ ⁶⁷⁰ ⁶⁷¹ ⁶⁷² ⁶⁷³ ⁶⁷⁴ ⁶⁷⁵ ⁶⁷⁶ ⁶⁷⁷ ⁶⁷⁸ ⁶⁷⁹ ⁶⁸⁰ ⁶⁸¹ ⁶⁸² ⁶⁸³ ⁶⁸⁴ ⁶⁸⁵ ⁶⁸⁶ ⁶⁸⁷ ⁶⁸⁸ ⁶⁸⁹ ⁶⁹⁰ ⁶⁹¹ ⁶⁹² ⁶⁹³ ⁶⁹⁴ ⁶⁹⁵ ⁶⁹⁶ ⁶⁹⁷ ⁶⁹⁸ ⁶⁹⁹ ⁷⁰⁰ ⁷⁰¹ ⁷⁰² ⁷⁰³ ⁷⁰⁴ ⁷⁰⁵ ⁷⁰⁶ ⁷⁰⁷ ⁷⁰⁸ ⁷⁰⁹ ⁷¹⁰ ⁷¹¹ ⁷¹² ⁷¹³ ⁷¹⁴ ⁷¹⁵ ⁷¹⁶ ⁷¹⁷ ⁷¹⁸ ⁷¹⁹ ⁷²⁰ ⁷²¹ ⁷²² ⁷²³ ⁷²⁴ ⁷²⁵ ⁷²⁶ ⁷²⁷ ⁷²⁸ ⁷²⁹ ⁷³⁰ ⁷³¹ ⁷³² ⁷³³ ⁷³⁴ ⁷³⁵ ⁷³⁶ ⁷³⁷ ⁷³⁸ ⁷³⁹ ⁷⁴⁰ ⁷⁴¹ ⁷⁴² ⁷⁴³ ⁷⁴⁴ ⁷⁴⁵ ⁷⁴⁶ ⁷⁴⁷ ⁷⁴⁸ ⁷⁴⁹ ⁷⁵⁰ ⁷⁵¹ ⁷⁵² ⁷⁵³ ⁷⁵⁴ ⁷⁵⁵ ⁷⁵⁶ ⁷⁵⁷ ⁷⁵⁸ ⁷⁵⁹ ⁷⁶⁰ ⁷⁶¹ ⁷⁶² ⁷⁶³ ⁷⁶⁴ ⁷⁶⁵ ⁷⁶⁶ ⁷⁶⁷ ⁷⁶⁸ ⁷⁶⁹ ⁷⁷⁰ ⁷⁷¹ ⁷⁷² ⁷⁷³ ⁷⁷⁴ ⁷⁷⁵ ⁷⁷⁶ ⁷⁷⁷ ⁷⁷⁸ ⁷⁷⁹ ⁷⁸⁰ ⁷⁸¹ ⁷⁸² ⁷⁸³ ⁷⁸⁴ ⁷⁸⁵ ⁷⁸⁶ ⁷⁸⁷ ⁷⁸⁸ ⁷⁸⁹ ⁷⁹⁰ ⁷⁹¹ ⁷⁹² ⁷⁹³ ⁷⁹⁴ ⁷⁹⁵ ⁷⁹⁶ ⁷⁹⁷ ⁷⁹⁸ ⁷⁹⁹ ⁸⁰⁰ ⁸⁰¹ ⁸⁰² ⁸⁰³ ⁸⁰⁴ ⁸⁰⁵ ⁸⁰⁶ ⁸⁰⁷ ⁸⁰⁸ ⁸⁰⁹ ⁸¹⁰ ⁸¹¹ ⁸¹² ⁸¹³ ⁸¹⁴ ⁸¹⁵ ⁸¹⁶ ⁸¹⁷ ⁸¹⁸ ⁸¹⁹ ⁸²⁰ ⁸²¹ ⁸²² ⁸²³ ⁸²⁴ ⁸²⁵ ⁸²⁶ ⁸²⁷ ⁸²⁸ ⁸²⁹ ⁸³⁰ ⁸³¹ ⁸³² ⁸³³ ⁸³⁴ ⁸³⁵ ⁸³⁶ ⁸³⁷ ⁸³⁸ ⁸³⁹ ⁸⁴⁰ ⁸⁴¹ ⁸⁴² ⁸⁴³ ⁸⁴⁴ ⁸⁴⁵ ⁸⁴⁶ ⁸⁴⁷ ⁸⁴⁸ ⁸⁴⁹ ⁸⁵⁰ ⁸⁵¹ ⁸⁵² ⁸⁵³ ⁸⁵⁴ ⁸⁵⁵ ⁸⁵⁶ ⁸⁵⁷ ⁸⁵⁸ ⁸⁵⁹ ⁸⁶⁰ ⁸⁶¹ ⁸⁶² ⁸⁶³ ⁸⁶⁴ ⁸⁶⁵ ⁸⁶⁶ ⁸⁶⁷ ⁸⁶⁸ ⁸⁶⁹ ⁸⁷⁰ ⁸⁷¹ ⁸⁷² ⁸⁷³ ⁸⁷⁴ ⁸⁷⁵ ⁸⁷⁶ ⁸⁷⁷ ⁸⁷⁸ ⁸⁷⁹ ⁸⁸⁰ ⁸⁸¹ ⁸⁸² ⁸⁸³ ⁸⁸⁴ ⁸⁸⁵ ⁸⁸⁶ ⁸⁸⁷ ⁸⁸⁸ ⁸⁸⁹ ⁸⁹⁰ ⁸⁹¹ ⁸⁹² ⁸⁹³ ⁸⁹⁴ ⁸⁹⁵ ⁸⁹⁶ ⁸⁹⁷ ⁸⁹⁸ ⁸⁹⁹ ⁹⁰⁰ ⁹⁰¹ ⁹⁰² ⁹⁰³ ⁹⁰⁴ ⁹⁰⁵ ⁹⁰⁶ ⁹⁰⁷ ⁹⁰⁸ ⁹⁰⁹ ⁹¹⁰ ⁹¹¹ ⁹¹² ⁹¹³ ⁹¹⁴ ⁹¹⁵ ⁹¹⁶ ⁹¹⁷ ⁹¹⁸ ⁹¹⁹ ⁹²⁰ ⁹²¹ ⁹²² ⁹²³ ⁹²⁴ ⁹²⁵ ⁹²⁶ ⁹²⁷ ⁹²⁸ ⁹²⁹ ⁹³⁰ ⁹³¹ ⁹³² ⁹³³ ⁹³⁴ ⁹³⁵ ⁹³⁶ ⁹³⁷ ⁹³⁸ ⁹³⁹ ⁹⁴⁰ ⁹⁴¹ ⁹⁴² ⁹⁴³ ⁹⁴⁴ ⁹⁴⁵ ⁹⁴⁶ ⁹⁴⁷ ⁹⁴⁸ ⁹⁴⁹ ⁹⁵⁰ ⁹⁵¹ ⁹⁵² ⁹⁵³ ⁹⁵⁴ ⁹⁵⁵ ⁹⁵⁶ ⁹⁵⁷ ⁹⁵⁸ ⁹⁵⁹ ⁹⁶⁰ ⁹⁶¹ ⁹⁶² ⁹⁶³ ⁹⁶⁴ ⁹⁶⁵ ⁹⁶⁶ ⁹⁶⁷ ⁹⁶⁸ ⁹⁶⁹ ⁹⁷⁰ ⁹⁷¹ ⁹⁷² ⁹⁷³ ⁹⁷⁴ ⁹⁷⁵ ⁹⁷⁶ ⁹⁷⁷ ⁹⁷⁸ ⁹⁷⁹ ⁹⁸⁰ ⁹⁸¹ ⁹⁸² ⁹⁸³ ⁹⁸⁴ ⁹⁸⁵ ⁹⁸⁶ ⁹⁸⁷ ⁹⁸⁸ ⁹⁸⁹ ⁹⁹⁰ ⁹⁹¹ ⁹⁹² ⁹⁹³ ⁹⁹⁴ ⁹⁹⁵ ⁹⁹⁶ ⁹⁹⁷ ⁹⁹⁸ ⁹⁹⁹ ¹⁰⁰⁰

END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

1827.

IN THE

Court of KING's BENCH

IN

Michaelmas Term,

In the Eighth Year of the Reign of GEORGE IV.

MEMORANDA.

IN the course of the vacation Sir *Anthony Hart*, Vice-Chancellor, was promoted to the office of Lord Chancellor of *Ireland*, upon the resignation of Lord *Manners*, and was succeeded by

Lancelot Shadwell, of *Lincoln's-Inn*, Esq.

On the first day of this term, *Charles Frederick Williams*, Esq., *William Selwyn*, Esq., and the Honourable *Thomas Erskine*, all of *Lincoln's-Inn*, having been, in the course of the vacation, appointed His Majesty's Counsel learned in the law, were called within the bar, and took their rank accordingly.

1827.

Tuesday,
November 6th.

DOE on the demise of LUCY NEWTON against
TAYLOR.

A. B., seized of a moiety of several estates, the whole of which had been her father's, (but of which she took one part as heir of her father, and the remainder as heir of a niece, her father's granddaughter,) devised "all her moiety of and in all her late father's messuages," &c.; Held, that the devise took, as well the estates which descended from the niece, as those which descended immediately from the testatrix's father.

EJECTMENT for lands in the parish of *Glossop*, in the county of *Derby*. Plea, not guilty. At the trial before Lord Tenterden C. J., at the last Summer assizes for *Derby*, it appeared that the lands in question were formerly the property of one *Buckley Bower*, who in the year 1797, upon the intended marriage of his son *George Buckley Bower*, settled them to the use of himself until the marriage, then to the use of *G. B. Bower* for life, subject to an annuity to the wife, remainder to the use of *G. B. Bower*, his heirs and assigns for ever. The marriage took place, and in 1800 the wife died, leaving her husband and one daughter, *Frances Bower*, her surviving. In the same year *G. B. Bower* died intestate, as to his real estates, leaving his daughter *Frances* him surviving. In 1803 *Buckley Bower* died, having, by his will made in 1801, devised as follows:—An estate in *Ollersett*, in the parish of *Glossop*, in trust for his daughter *Lucy* (the lessor of the plaintiff), the wife of *Robert Newton*, and her children; then, "as for and concerning all other his messuages, tenements, closes, lands, and hereditaments situate &c. in *Edale*, in the parish of *Castleton*, in the county of *Derby*, and in the hamlets of *Thornsett*, *Phoside*, and *Whittle*, in the parish of *Glossop* aforesaid, he gave and devised to his daughter, *F. C. Bower*, *C. Prescott*, and *T. Wright*, their heirs and assigns for ever, upon certain trusts, and subject to them, in trust, to accumulate and lay up the rents,

1827.

Don dec.
Newton
against
Tatlor.

rents, issues, and profits thereof, until his grand-daughter, *Frances Bower*, should attain the age of twenty-one years, or die before that period. And in case she should attain that age, then, in trust, to convey the fee-simple to her, her heirs and assigns for ever. And in case his grand-daughter should die under age, without lawful issue, in trust for his own right heirs." The testator, *Buckley Bower*, had other real estates besides those settled on the marriage of his son, and the estate in *Ollersett*, given to trustees for the use of Mrs. *Newton*. The grand-daughter, *F. Bower*, died in 1815, intestate and without issue, leaving the lessor of the plaintiff and her sister, *F. C. Bower* (daughters of *Buckley Bower*, the testator,) her co-heiresses at law. By indentures of lease and release of 1820, *F. C. Bower* conveyed all her real estates to a trustee, habendum to him and his heirs, to the use of him and his heirs, in trust for her, *F. C. Bower*, her heirs and assigns for ever. In 1824 *F. C. Bower* made her will, duly executed and attested, to pass real estates, and thereby devised "all that her undivided moiety or equal half part (the whole into two equal parts to be divided) of and in all and every of her late father's messuages, tenements, closes, lands, real estates, hereditaments, and premises, situate, &c. in *Edale*, in the parish of *Castleton*, in the county of *Derby*, in the several hamlets or places called *Thornsett*, *Phosick*, and *Whittle*, all in the parish of *Glossop* aforesaid, to certain persons, to the use of the defendant for life." *F. C. Bower* died on the 17th of January 1826, leaving the lessor of the plaintiff her heiress at law. For the plaintiff it was contended, that the estates settled on the marriage of *G. B. Bower* could not be considered as the property of the father at the time when

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1827.
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 Doe dem.
 Newton
 against
 Taylor.

his will was made, and that the testatrix *F. C. Bower* took the moiety of them, not as heir of her father, but as heir of her niece, and, therefore, they did not come within the description of the lands devised by her will, and, consequently, the lessor of the plaintiff was entitled to recover those lands as her heir at law. Lord *Tenterden* C. J. thought the description in the will applied to those lands, and that they passed under the will to the defendant, and he directed a nonsuit, giving the lessor of the plaintiff leave to move to enter a verdict in her favour.

Denman C. S. now moved accordingly, and contended, that the right of *Mrs. Newton*, as heir at law, was not to be defeated, except by express words or necessary intendment; that the power of the father over the property in question ceased upon the execution of the settlement, *Doe dem. Ryall v. Bell* (a); and that it could no longer be described with propriety as the estate of the father, and consequently would not pass by the will devising "all her late father's messuages," &c. That the very fact of a description of the lands devised being introduced into the will raised a supposition that the testatrix did not mean it to apply to the whole of her real estate, *Doe v. Parkin* (b).

Lord *TENTERDEN* C. J. In that case the testator described the property devised as "then in his occupation." That clearly pointed out certain specific lands as the subject-matter of the devise. But there is nothing to restrict the meaning of the words in question. The

(a) 8 T. R. 579.

(b) 5 Taunt. 32.

whole of the testatrix's real property had been her late father's, although part she inherited as heir of her niece and part as heir or devisee of her father. The description in the will applies to the whole, and we cannot say that she intended to die intestate as to any part of it. The lessor of the plaintiff has not, therefore, any right to recover.

1827.

*Dox dep.
NEWTON
against
TAYLOR.*

Rule refused.

HARPER *against* LUFFKIN.

*Wednesday,
November 7th.*

TRESPASS for debauching the plaintiff's daughter and servant. Plea, not guilty. At the trial before *Gaselee J.* at the last Summer assizes for *Essex*, it appeared that the plaintiff's daughter was married eight years ago, had two children, and was five years ago separated from her husband, who never during that period had any access to her. After this separation she returned to her father's house, and lived with him, acting as his servant. During such residence with her father she became acquainted with the defendant, and had a child by him. For the defendant it was contended, that the relation of master and servant could not, under such circumstances, exist between the plaintiff and his daughter. The learned Judge overruled the objection, and the plaintiff had a verdict for 10*l.*

Where a married woman separated from her husband, lived with her father, and acted as his servant: Held, that he might maintain an action against a person by whom she was debauched and had a child.

Jessopp now moved to enter a nonsuit upon the objection taken at the trial. This action is founded on the loss of the child's service; but if the relation of master and servant could not exist between the plaintiff and his daughter, the very foundation of the action

1827.

———
HARRIS
against
LUFFKIN.

failed. Now the husband had not consented to his wife becoming the servant of her father, and might at any time have reclaimed her.

Lord TENTERDEN C. J. This motion depends upon the question, Whether the plaintiff's daughter could under the circumstances which appeared in evidence, be considered as his servant. It was not disputed that she performed various acts of service, but it is said that a married woman living apart from her husband, could not make a contract of service. In many instances, married women are in fact hired as servants. Such contracts are no doubt liable to be defeated at the will of the husband. He may put an end to that relation of master and servant; but, unless he interferes, it by no means follows that such a relation may not exist, especially as against third persons who are wrong-doers. It appears to me that such a relation might, and did, in fact, exist in this case; and that, in the absence of any interference by the husband, it is not competent to the defendant to set up his rights as an answer to the action.

Rule refused.

Wednesday,
 November 7th.

COATES and Another, Assignees of Cox, *against*
 Lord HAWARDEN.

An Irish peer
 cannot be ar-
 rested for a
 debt.

THE defendant in this case had been arrested by the sheriff of Sussex, and given a bail bond. It appeared by the affidavit, that the defendant was a viscount of that part of the United Kingdom called *Ireland*; that
 his

his right to vote in the election of representative peers had been allowed by the House of Lords, and exercised by him. A rule was now obtained for setting aside the pluries capias issued in the case, and delivering up the bail bond to be cancelled, on the ground that the defendant, as a *peer of Ireland*, was privileged from arrest, the Act of Union 40 G. 3. c. 67. art. 4. providing that the peers of *Ireland* shall, as peers of the United Kingdom, be sued and tried as peers, and shall enjoy all privileges of peers as fully as the peers of *Great Britain*; the right of sitting in the House of Lords, and the privileges depending thereon (a), and the right of sitting on the trial of peers, only excepted. The Court, on granting the rule, said they entertained no doubt as to the defendant's privilege. On a subsequent day *Gurney*, who was instructed to have shewn cause against the rule, said that he would not oppose the rule, provided the defendant would undertake to bring no action; and this being acceded to, the rule was made absolute.

1827.

COATES
against
Lord
HAWARDEN.

Rule absolute (b).

(a) Freedom from arrest in a civil suit seems, in the case of a peer, to be a privilege incident to the peerage itself, and not to depend on the right to sit in the House of Peers; for peeresses, by birth or marriage, are privileged on account of their dignity, and because they are supposed to have sufficient property by which they may be compelled to appear. *Commentary on Russell's case*, 6 Coke, 53.

(b) The under sheriff of *Sussex* was, on complaint of the defendant, committed by the House of Lords to the custody of the serjeant at arms, and afterwards discharged on payment of the fees.

1827!

*Shurzam. v. Marshall 7. m. M. L. 417.*Thursday,
November 8th.

ATTWOOD against SMALL and Others.

Where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement as if it had been repeated therein: Held, that the clause referred to could not be considered as "annexed to" the new agreement so as to make an additional stamp necessary, on the ground of the agreement, with the clause, containing more than 1080 words.

ASSUMPSIT for interest payable according to three agreements set out in the declaration for the sale of certain real property by the plaintiff to the defendants. Plea, the general issue. At the trial before *Littledale J.* at the last assizes for *Stafford*, the plaintiff produced in evidence these three agreements, by the first of which the plaintiff agreed to sell certain real property to the defendants, and the price was to be paid by instalments, with interest upon each from the time appointed for payment. By the second some alterations were made in the terms of the former agreement, and it contained a clause that all disputes between the parties should be submitted to arbitration. These two agreements were properly stamped. The third, which was indorsed on the second, made some further alterations, and it was thereby agreed "that the provision for arbitration contained in the second agreement, and the agreement therein also contained for carrying the same provision into effect, &c., should extend to that (the third) agreement, and to every clause therein contained, in like manner as if the same had been therein repeated." This instrument had a 1*l*. stamp, and, taken by itself, did not contain 1080 words; but if the clause of reference in the former agreement were taken as part of it, the number of words exceeded 1080. For the defendants it was objected that the clause of reference must be considered as actually embodied in the third agreement, and that therefore it had not a sufficient stamp,

stamp, and could not be read in evidence. The learned Judge overruled the objection; and the plaintiff having obtained a verdict,

1827.

ATTWOOD
against
SMALL.

Campbell now renewed his objection, and contended that the third instrument could not be read in evidence without the other to which it referred; that the words of reference had the same effect as if the former agreement had been actually annexed to the last, and that consequently the 11. stamp was insufficient; and he relied upon *Lake v. Ashwell* (a).

LORD TENTERDEN C. J. The duty is imposed by the 55 G. 3. c. 184. upon the words contained in the instrument itself, together with every "schedule, receipt, or other matter put or indorsed thereon, or annexed thereto." In *Lake v. Ashwell* the schedule was annexed to the deed, in the very words of the act of parliament. In the present case, the words of the clause of reference were not in the instrument, nor in any schedule, receipt, or other matter put or indorsed thereon or annexed thereto. I am, therefore, of opinion, that the stamp was sufficient, and the instrument properly received in evidence.

Rule refused.

(a) 5 East, 326.

1839

Thursday,
November 6th.DOE on the demise of Lord SUFFIELD against
PRESTON.

Where an inclosure act gave the commissioners power to award lands in exchange for others in an adjoining parish, and also to award lands to those who bought them of persons entitled to allotments: Held, that they might award lands given in exchange partly for other lands and partly for money, and that the award need not have an ad valorem stamp upon the money consideration.

EJECTMENT for lands in the parish of *Felmingham*, in the county of *Suffolk*. Plea, the general issue. At the trial before *Alexander C. B.*, at the last Summer assizes for *Suffolk*, it appeared that the lands in question, and certain lands in the adjoining parish of *Suffield*, originally belonged to the defendant. The lessor of the plaintiff had lands in the parish of *Felmingham*. An act of parliament was passed for inclosing lands in *North Walsham* and *Felmingham*, by which it was (amongst other things) enacted, "that it should be lawful for the commissioners to set out, allot, and award any lands, tenements, or hereditaments whatsoever within the parishes of *North Walsham* and *Felmingham*, or either of them, in lieu of or in exchange for any other lands, tenements, or hereditaments whatsoever within the said respective parishes, or within any adjoining parish, provided that all such exchanges were ascertained and specified in the award of the commissioners, and were made with the consent of the owner or owners, proprietor or proprietors of the lands, tenements, or hereditaments which should be so exchanged, whether such owner or owners, proprietor or proprietors, should be a body or bodies politic, corporate, &c., or tenants in fee simple, &c., such consent to be testified in writing under the common seal of the body or bodies politic, &c. and under the hands of the other consenting parties respectively." By another clause in the inclosure

inclosure act, it was provided, "that in cases where persons had sold, or agreed to sell, or should at any time before the execution of the award of the commissioners, sell, or agree to sell, their interest in the lands directed to be inclosed, the commissioners were authorized to make an allotment of the land to the purchaser, and every such purchaser should, after the execution of the said award, hold and enjoy the land so allotted to him, in the same manner as the vendor could have done in case such sale had not been made." It was agreed between the lessor of the plaintiff and the defendant, that the former should have the lands in question, and the defendant's lands in the parish of *Suffield*, and that the defendant should receive in exchange the lessor's lands in the parish of *Felmingham*, and the sum of 2000*l.*, which was duly paid to him. The award being produced, it appeared that the land in dispute was, together with some other, awarded to the lessor of the plaintiff in exchange for his land in *Felmingham*, and the sum of 2000*l.* It was thereupon objected for the defendant; that the commissioners had no power to award lands in exchange for others unless they were of equal value, and that an exchange partly for land and partly for money was beyond their authority; and, secondly, that if this were to be treated as a sale of the land in question, the award should have been upon an *ad valorem* stamp, whereas it had merely an award stamp. The Lord Chief Baron overruled the objections; and the plaintiff having obtained a verdict,

1827

Dox dem.
Lord SUFFIELD
against
Parker.

The *Solicitor General* moved for a new trial, and renewed the objections taken at the trial. He contended, that as persons having an estate less than an estate

1897.

DOE dem.
 Lord SUFFIELD
 against
 PRESTON.

estate in fee, were enabled to exchange lands, the commissioners could not properly carry agreements for exchange into effect unless the lands were of equal value, and if they did, the award must be considered as an ordinary conveyance, and be subject to an ad valorem stamp.

LORD TENTERDEN C.J. I think that there is not any weight in either objection. The commissioners had power to award land in exchange for other land, or for money paid. Here they have awarded land partly in exchange for land and partly for money. They have not, therefore, exceeded their jurisdiction. Their award appears to have the stamp imposed on such instruments by the act of parliament, and that is sufficient.

Rule refused.

Thursday,
 November 8th.

FAWCETT against FOWLIS, Baronet, and Another.

Where, in trespass against two magistrates for breaking and entering the plaintiff's close in the parish of A. and seizing his sheep, it appeared that the defendants,

upon the complaint of the surveyor of the highways appointed for the whole parish, convicted the plaintiff of neglecting to do statute duty, and issued a warrant to levy the penalty under which the act complained of was done: Held, that the conviction being good upon the face of it, was a sufficient defence, and that the plaintiff could not, in this action, try the question, whether the land which he occupied was exempt from the burthen of repairing the roads in other parts of the parish.

The surveyor called upon the plaintiff to do certain statute duty, or compound for it. The conviction stated that he was an occupier of land in the parish, and had neglected to do the work, but did not notice the composition: Held, that it was unnecessary to do so, or to state that the plaintiff kept a team; for that, if he did not keep a team, or had compounded for the statute duty, that was a matter of defence, which ought to have been urged by him in answer to the complaint.

statute

statute duty on the roads in the township of *Ingleby* in the same parish, refused to do so, whereupon he was summoned before the defendants, two justices of the peace, and convicted as follows: "Be it remembered, that on, &c. *Thomas Peacock* of the parish of *Arndcliffe*, surveyor of the highways for the said parish, came before us, &c. and informed us that *John Fawcett* (the plaintiff) was on, &c. served with a notice under the hand of him, *T. P.*, whereby he was required to send one wain or cart furnished with no less than two able horses and one able man, *with proper tools*, to be at, &c. on, &c. and do certain statute duty specified in the conviction, or compound for the same two days before the time appointed for doing the work; and that the said *J. F.* (although liable to the same by reason of his occupation of a certain farm and lands within the same parish) neglected to attend and perform such statute duty, contrary to the statute, &c. Whereupon the said *J. F.* being duly summoned to answer the said charge, appeared before us, on, &c. and having heard the charge, declared that he was not guilty thereof. But the same being fully proved upon the oaths of *T. P.* and *T. B.*, credible witnesses, it manifestly appears to us (defendants) that *J. F.* is guilty of the offences charged. It is therefore considered and adjudged by us that he be convicted, and we do hereby convict him of the same." The conviction then proceeded to declare a certain sum forfeited according to the form of the statute. Upon this conviction a distress warrant was granted, and the sheep of the plaintiff were seized, which was the alleged trespass for which the action was brought. Upon this conviction being put in, it was objected for the defendants, that as it remained ~~unappealed~~ against and unreversed, the action could not

1827.

Fawcett
against
Fowles.

be

1827.

FAWCETT
against
POWLES.

be maintained. The learned Judge was of that opinion, and directed a nonsuit, giving the plaintiff leave to move to enter a verdict in his favour for nominal damages, if the Court should be of opinion that the conviction was bad, or his direction wrong.

Brougham now moved pursuant to the leave reserved. The conviction in this case was in respect of the plaintiff's disobedience of an order to perform statute duty. Now that order directed the plaintiff to send a cart and horses with a man and proper tools; but the highway act does not compel the party doing statute duty to find tools. The order was, therefore, unwarranted by the statute; and the plaintiff was not bound to obey it. Secondly, the order was to perform the statute work or compound for it; the conviction is, for not performing the work, and does not mention the composition. It is therefore consistent with all that appears upon the conviction, that the plaintiff might have compounded for the statute work, and therefore would not be liable to the conviction. Neither is it alleged in the conviction that statute duty in kind was necessary. [Lord *Tenterden* C. J. That must have been ascertained before the surveyor's requisition, and must, therefore, be presumed.] At all events, it should have been shewn that the plaintiff kept a team, for he could not otherwise be called upon to do statute work with a team. Supposing, however, the conviction to be correct in form, still it was not a sufficient answer to this action, unless the justices acted within their jurisdiction. Now, that could not be ascertained without hearing the evidence in the cause, for if the plaintiff was not, by reason of his occupation of land in *Arncliffe*, bound to repair the roads in *Ingleby*, the surveyor had no right to order him to do statute work

work in that township, nor had the justices any authority to convict him for disobeying that order. And this was the real question intended to be tried. All the proceedings by the surveyor, the magistrates, and the plaintiff, were taken with a view to raise the question of such liability, and have it solemnly decided by this Court.

1827.

FANCETT
against
FOWLER.

Lord TENTERDEN C. J. I am of opinion that the nonsuit in this case was right, and ought not to be disturbed. The conviction was clearly good in substance, and being in full force was a sufficient answer to the action. By the highway act certain statute duty is required to be performed by all persons occupying land and keeping a team. There is also a provision, that parties may relieve themselves from the performance of this duty by paying certain sums, to be appointed by the justices, who may, however, refuse to allow this relief, and insist upon having the statute work performed. That power was not acted upon in this instance; the surveyor gave notice to the plaintiff to do the work or compound for it. If he had paid the composition, that would have been a good defence to the charge of neglecting to perform the work; but it was matter of defence only, and the proceeding for non-performance of the work was correct. As to the objection, that the plaintiff was ordered to provide tools, it is sufficient to say, that he was not convicted for neglecting to do so, and, therefore, the objection falls to the ground. In the next place, it was objected that the conviction does not allege that the plaintiff kept a team; that is true, but he is described as the occupier of land, which *prima facie* rendered him liable; and if he kept no team, that was matter to be urged in his defence

1827.

FAVOUR
AGAINST
POWELL.

defence before the justices. Then it was urged that the whole of these proceedings were taken in order to try the question of liability. If, however, the inhabitants of the township of *Arncliffe* meant to contend that they were not liable to contribute to the repair of the roads in *Ingleby*, their proper course was to appeal against the appointment of one surveyor for the whole parish. *Prima facie* all persons occupying lands within the parish were liable to repair all the roads in the parish. The surveyor appointed for the whole parish gave notice to the plaintiff to do certain statute duty; having neglected to do it, he was summoned, and it does not appear that even before the justices the question of liability was raised. Then a conviction ensued, followed up by a warrant and distress; and it appears to me that it is not competent to the plaintiff in this late stage of the proceedings to raise and try the question of the liability of the occupier of lands in *Arncliffe* to contribute to these repairs. For some time I was disposed to think this case analogous to some that have arisen on the poor laws, in which it has been held, that if a person not an occupier or resident within a given parish be there rated to the relief of the poor, and his goods are distrained for the rate, he may maintain an action against the party levying (a). But in those cases there was an entire want of jurisdiction. Here the justice had jurisdiction to hear and decide upon the complaint of the surveyor, and the present plaintiff, as an occupier of lands within the parish, was *prima facie* liable to the burden imposed. If in this late stage the question of liability could be raised, it might be equally raised after an appeal to the sessions against the appointment of

(a) See *Nichols v. Walker*, Cro. Car. 394. *Milward v. Coffin*, 2 Black. 1351. *Lord Amherst v. Lord Somers*, 2 T. R. 572.

one surveyor for the whole parish, although they might have decided that the appointment was proper, and one highway rate for the whole parish also proper. The impropriety of rendering magistrates liable to be sued for acting upon such a decision of the sessions is an additional reason for holding that the nonsuit in this case was proper.

1827.

Warrant
against
Rovell.

HOLROYD J. If there had been separate surveyors for the townships of *Arncliffe* and *Ingleby*, and the surveyor of the latter had directed work to be done in *Arncliffe* as if it were in *Ingleby*, then upon a complaint made of the neglect to do it, the magistrate would have had no jurisdiction; and if he had convicted the party and issued a warrant to levy the penalty, he would have been liable to an action, in the same manner as for enforcing the payment of a poor-rate under the circumstances mentioned by my Lord *Tenterden*.

LITLEDALE J. concurred.

Rule refused. (a)

(a) See *Strickland v. Ward*, 7 T. R. 633.

Key v. Monkhouse & Bury, B. C. 12

GEORGE BUTCHER *against* JOHN BUTCHER.

Thursday,
November 8th.

TRESPASS for breaking and entering the plaintiff's close, mowing, and cutting down the grass, corn, and crops; and taking and carrying away the hay, corn, and crops of the plaintiff. Plea, first, not guilty. Secondly, *liberum tenementum*. At the trial before *Garrow B.*, at the Summer assizes for the county of *Bucks*, 1827, it appeared that the plaintiff and defendant

A party having the legal title to land having entered, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards.

were

1827.

Butcher
v.
Butcher

were the sons of George Butcher, who in 1761 was admitted a copyhold tenant to the close in question, to hold to him the said George Butcher the elder, W. S. Butcher, his second son, and G. Butcher, the younger, his eldest son (the plaintiff), for the term of their lives, and the lives and life of the survivors and survivor. George Butcher, the father, died in 1807, and W. S. Butcher remained in possession of the close in question from that time to January, 1827, when he died, and by his will devised the close to John Butcher, the defendant in fee, and appointed him sole executor of his will. The defendant entered into possession of the close as devisee. On the 10th of March 1827, the plaintiff and his servants cut the chain which fastened the gate of the close, and entered the same, and began to plough the land; the defendant then ordered the plaintiff's men to leave the close. On the 21st of June, the defendant mowed the grass growing in the close, made it into hay, and afterwards carried it away. Upon this evidence, it was contended by the defendant's counsel, that the plaintiff had not a sufficient possession of the close in question to entitle him to maintain trespass; because a party who has the freehold in law, but not the actual possession, cannot maintain trespass. *Com. Dig. Trespass* (B 2.), and 2 *Roll's Abr.* 553. *Trespass* pl. 45. Here the defendant continued in actual possession. Assuming that the plaintiff, by entering, acquired a concurrent possession with the plaintiff, that is not sufficient; he ought to have the exclusive possession. *Stocks v. Booth* (a). On the other hand, it was insisted that the plaintiff by entry had acquired the freehold in

(a) 1 T. Rep. 423.

(a) 1 T. Rep. 423.

1897.

Friday,
November 6th.

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Article of
agreement,
whereby one
party agreed to
pay the other a
fixed salary,
and the other
agreed not to
act up a chem-
ist's duty
or to be a certain
amount, and
the parties were
mutually agreed
in a salary of
\$10,000 per
annum, from the agree-
ment made,
to require a
salary of \$10,000

agreement, and received
salary of \$10,000
in a month, and the
other party agreed to
act up a chemist's
duty, and to be a
certain amount, and

the parties were
mutually agreed
in a salary of

1827.

BUTCHER
against
BUTCHER

Lord TENTERDEN C.J. If he who has the right to land, enters and takes possession, he may maintain trespass. It is not necessary that the party who makes the entry should declare that he enters to take possession; it is sufficient, if he does any act, to shew his intention. Here his servants ploughed the land. It is manifest, therefore, that he intended to take possession.

BAYLEY J. *Taunton v. Costar* (a) is an authority to shew that a party wrongfully holding possession of land cannot treat the rightful owner, who enters on the land, as a trespasser. I think that a party having a right to the land, acquires by entry the lawful possession of it, and may maintain trespass against any person who being in possession at the time of his entry, wrongfully continues upon the land.

Rule refused.

(a) 7 T. R. 431.

1827.

MOUNSEY *against* STEPHENSON.Friday,
November 9th.

COVENANT on articles of agreement, whereby the plaintiff agreed to pay the defendant a salary of 35*l.* per annum, and the defendant covenanted not to set up a chemist's shop within one mile of the plaintiff's, and whereby the plaintiff and defendant were mutually bound in a penalty of 600*l.* to perform the agreement. Breach, that defendant had opened a chemist's shop within one mile of the plaintiff's. Plea, that he had not opened such shop. At the trial before *Park J.* at the last assizes for *Surrey*, the articles of agreement were produced, impressed with a stamp of 1*l.* 15*s.* For the defendant it was objected, that the instrument was to be considered as a bond to secure the payment of an annual sum of money, or as a bond with a penalty to secure the performance of an agreement, and in either case the stamp was insufficient. The learned Judge reserved the point; and the plaintiff having obtained a verdict,

Articles of agreement, whereby one party agreed to pay the other a fixed salary, and the other agreed not to set up a chemist's shop within a certain distance, and the parties were mutually bound in a penalty of 600*l.* to perform the agreement: Held, to require a stamp of 1*l.* 15*s.*

Marryat now moved to enter a nonsuit, and renewed his former objection upon the authority of *Attree v. Anscumb (a)*, where it was held, that a bond conditioned to pay rent, was a bond conditioned to pay the sum to which the rent would amount, and required an ad valorem stamp.

Lord TENTERDEN C. J. If you take this instrument as a bond, it is not for the payment of an annuity, nor

(a) 2 M. & S. 83.

1827.

**MOUNT
against
SERRINGTON.**

for the payment of any certain sum of money. It is not a bond of any of the kinds specified in the stamp act, and was therefore liable to a stamp duty of 11. 15s. as a bond, "not otherwise charged." If you treat it as a bond conditioned for the performance of agreements contained in the same instrument, the statute expressly states that it shall not be subject to a separate duty. Taking the instrument as a common deed, the stamp was sufficient; there is not, therefore, any ground for disturbing the verdict.

Rule refused.

Saturday,
November 10th.

NOWELL against ROAKE.

In an action for mesne profits, the plaintiff may recover by way of damages, costs incurred by him in a court of error in reversing a judgment in ejectment obtained by the defendant.

TRESPASS for mesne profits of one undivided moiety of two water corn mills. Plea, not guilty. At the trial before *Park J.*, at the Summer assizes for the county of *Surrey* 1827, it appeared that the plaintiff in the first instance had brought his ejectment in the Common Pleas, and that judgment was there given for defendant, and that that judgment had been afterwards reversed in the King's Bench. The plaintiff claimed to recover, by way of damages, the costs in error, and he proved the amount of those costs to be 200*l.*, considering them as costs between attorney and client. The learned Judge was of opinion, that the costs in the court of error were part of the damages sustained by the plaintiff in consequence of his having been wrongfully kept out of possession; and the jury under his direction found a verdict for the plaintiff for 510*l.*, which included those costs; but liberty was reserved to the defendant to move

to

to reduce the damages to 310*l.*, if the Court should be of opinion that the plaintiff was not entitled to recover the costs in error.

1827,

Nowell,
against
Roake.

Gurney now moved accordingly, and contended that the plaintiff could not recover costs in error even by way of damages; and he cited *Bell v. Potts* (a), *Wyvil v. Stapleton* (b), to shew that where a judgment is reversed, the court of error cannot give costs.

Lord TENTERDEN C. J. There can be no doubt that the court of error could not award costs to the plaintiff. But the expences incurred in the court of error were part of the damages sustained by the plaintiff, by reason of his having been wrongfully kept out of possession by the act of the defendant; and I think that the jury might reasonably consider the costs between attorney and client as the measure of the damages which he had sustained.

Rule refused.

(a) 5 *East*, 49.

(b) *Strange*, 616.

1827.

Saturday,
November 10th.

WOOLDRIDGE, Administratrix of GEORGE
WOOLDRIDGE, against BISHOP.

By the special memorandum of a declaration, it was stated, that the plaintiff, administratrix, on the 20th of January, brought her bill into the office of the clerk of the declarations of K. B., according to the course and practice of the court, and filed the same as of *Michaelmas* term, 7 G. 4., which said bill follows in these words: "Be it remembered, that on the 20th day of January, 7 G. 4., *Elizabeth Wooldridge*, administratrix of all and singular, &c. the goods and chattels, &c. of *George Wooldridge*, brought her bill into the office of the clerk of the declarations of the Court of K. B. according to the course and practice of the same Court, and filed the same bill as of *Michaelmas* term, 7 G. 4., which said bill follows in these words." There then followed counts for goods sold, money paid, &c., and in the breach it was averred that administration was granted to the plaintiff on the 10th of January 1827. Plea, that the plaintiff at the time of exhibiting the bill was not administratrix. Upon this plea issue was joined. At the trial before *Vaughan B.*, at the *Worcester Summer assizes*, 1827, it appeared that the defendant had been arrested in this cause in *Trinity* vacation 1826, upon a writ returnable the first return of *Michaelmas* term 1826, which was the 7th of November, and bail was duly put in on the 7th of November, and justified on the 11th of November. The declaration was delivered on the 20th of January 1827. At the time of the delivery of the declaration the defendant was not a prisoner: It was contended, that as by the practice of the Court, a bill could not be filed in vacation as of the preceding term,

term, against a party, unless he was a prisoner or an attorney, the bill in this case must be considered to have been filed in *Michaelmas* term, and if that were so, then the plaintiff at the time of exhibiting her bill, was not administratrix. The learned Baron was of opinion that it was made out in evidence that the plaintiff was administratrix at the time when the bill was exhibited, and he directed the jury to find for the plaintiff on the issue, but reserved liberty to the defendant to move to enter a nonsuit. The defendant moved for a new trial. The bill must be taken to have been exhibited the first day of *Michaelmas* term, and not on the 20th of *January*, when it was brought into the office of the clerk of the declarations, and if that be so, then the issue ought to have been found for the defendant, for by the practice of the Court, a bill can be filed in the vacation as of the preceding term, only against a prisoner in the actual custody of the marshal, or against an attorney. Here the defendant was neither a prisoner in the custody of the marshal, nor an attorney. The bill, therefore, was not exhibited against the defendant on the 20th of *January*, but as of *Michaelmas* term. In *Best v. Wilding (a)*, which was an action for use and occupation, the rent became due on the 5th of *April*, the writ was sued out on the 4th of *April*, it does not appear distinctly whether the arrest was before or after the rent became due, but, probably it was not till after. The issue was held that it was sufficient to prove a cause of action before the bill filed, although after the writ was sued out in *Sturges v.*

1827.

WOOLDRIDGE
against
Bianco.

1827

Woolman
against
Barnes

Westgarth &c) the action was for goods sold, the bill was filed on the day subsequent to the expiration of the credit, but the writ was issued before; the bill was entitled of the term of which the writ was returnable. It was held that the plaintiff was entitled to recover. But a bill, by the practice of the Court, may be specially entitled of any day in the term of which the writ is returnable, but it cannot be entitled of any day after the term. The title of the plaintiff must be perfect in that term of which the declaration is entitled. There is a distinction between an executor and an administrator; the former derives his right from the will, and may commence an action before probate, but an administrator derives his right from the ordinary. Before administration is granted he has no right whatever, and cannot maintain any action.

Lord TENTERDEN C. J. At Nisi Prius the Judge can only look at the record, and direct the jury to determine the issue joined upon that record according to the evidence. The plea in this case is, that the plaintiff, at the time of exhibiting her bill was not administratrix. It appears from the record, that the bill was exhibited on the 20th of January. It was proved, that the plaintiff was administratrix on the 20th of January. The issue to be tried, therefore, was, whether on the 20th of January there was a good administration. It was no part of the duty of the Judge or jury at Nisi Prius to determine whether the bill had been so exhibited according to the regular practice of the court. If it were contrary to that practice to entitle the bill at of the preceding term, the

(a) 4 East, 75.

Plaintiff

defendant

defendant ought to have moved to set aside the special memorandum for irregularity.

1827

Woolston
against
Bisnow

BAYLEY J. If the issue joined between these parties had been, whether at the time of commencing the suit the plaintiff was administratrix, the verdict ought, upon the evidence, to have been found for the defendant; but the issue was, Whether at the time of exhibiting the bill the plaintiff was administratrix. Now the bill in fact was exhibited on the 20th of January, and at that time the plaintiff was undoubtedly administratrix. I think, therefore, the verdict was properly found for the plaintiff.

HOLROYD and LITLEDALE Js. concurred.

Rule refused.

Bourne v. South. 9 B.C. 602
Johnson v. Taylor. 10 B.C. 128
Pickford v. Davis. 1 B.C. 467
Thompson v. Carr. 2 S. & R. 466
Frederick v. Rowne. 6 M. & W. 460
Kelch v. Harvey. 1 S. & R. 465

Vice against Lady ANSON.

ASSUMPSIT for goods sold and delivered. Plea, non-assumpsit. At the trial before Lord Tenterden C.J., at the London sittings after Trinity term 1827, it appeared that the action was brought against the defendant, as one of the adventurers in a mining company, to recover the price of goods sold, and work and materials furnished by the plaintiff for the working of the mine. The plaintiff himself, when he furnished the goods, had no knowledge of Lady Anson as a shareholder. It appeared that she had spoken and written of

ment of any interest in the mine had been made to her: Held, that the action could not be maintained.

herself,

1827.

Yates
against
Anson.

herself, in private letters and society, as being one; but she never signed any deed. She had paid her deposits on her shares, and had received certificates in the following form:—"Wheal Concord Tin and Copper Mine Company, No. 133. These are to certify, that the Viscountess Dowager Anson is the proprietor of the share or number 133, being one share of the Wheal Concord mine, situate in the parish of *St. Agnes*, in the county of *Cornwall*, and that her name is duly registered in the act-book of the said mine, subject to the rules, regulations, and orders of the said company; and that the said Viscountess Dowager Anson, her executors, administrators, and assigns, are entitled to the profits and advantages of such share. — By order of the directors, as witness my hand, this 14th day of *June*, in the year of our Lord 1822. *Christopher Vaux*, secretary to the said mine." The mine, at one time, before the proposal to form a company, had been in the hands of one *Thomas*; but it did not appear distinctly in what character he acted, or that any interest had been transferred from him to the company. The Attorney-General for the defendant, on these facts contended, that the defendant was not liable. He admitted there was some evidence to shew, that at one time she considered herself liable; but though that might be *prima facie* evidence against her, it could not make her so, if, on the other facts, she was not. She never became known as a partner, nor was she one in fact, for she never had any assignment made to her of the partnership property, nor did she sign any deed, so as to bring this within the case of *Larler v. Marshall* (a). The utmost she can have is a right in equity to call for

(a) 1 *Moody & Malkin*, 93.

an assignment of the partnership property; but until that is made she has no interest, for the certificate gives her none; and if she has none she is not a partner. *Ed. Tenterden* C. J. addressed the jury as follows: (a) —

"It is clear, in this case, that the plaintiff did not actually give credit to *Lady Anson*, and that she never held herself out to the world as a partner. If, therefore, she is chargeable, she can only be so on the ground that she is really interested; and no mistaken supposition of her own that she was so would make her liable, unless it were communicated to the plaintiff so as to mislead him. The partnership, if any, is not strictly a trading partnership; it is one formed for the purpose of working a mine, a species of real estate, and the plaintiff's claim is for labour and goods employed in working this mine. An interest in a real estate can only pass by certain formalities; and it is clear that the certificates are not sufficient to pass it, nor would the registration in the act-book of the company, as mentioned in them, even if it were made, of which there is no proof, be so. Is there, then, any evidence from which you can conclude that *Lady Anson* ever had any interest in the mines conveyed to her? The history of the mine is not much explained; but it appears that one *Thomas* had something to do with it in 1822 before the company was thought of, and we hear of no one else. It is not pretended that *Lady Anson* derived any interest from any one else, and it is not clear, even, that he had any. If he had none, he could communicate none: if he had any, *Lady Anson* would be liable or not, as he had transmitted it to her or not. His name is not on the

1827.

For
Anson
Anson.

(a) See 1 *Moody & Malkin*, 99.

1827:

Vice
against
Anson.

certificates; they do not profess to pass any thing from him, or to make him accountable for the money paid upon them, or for the profits arising from the mine. Directors are mentioned, but he is not shewn to be one of them, or in any way connected with them. The certificates, therefore, which clearly do not in themselves pass any interest, seem not even to furnish any evidence that an interest had passed from *Thomas*, or from any one else to *Lady Anson* (a). The question which yet have to consider is, whether it is made out to your satisfaction that *Lady Anson* had any interest in the mine? I think it is not." The plaintiff's counsel then elected to be nonsuited.

F. Pollock now moved to set aside the nonsuit. It was not necessary to shew that any formal conveyance was executed in order to vest in the defendant an interest in the mine; for the parties engaged in this undertaking may have worked under a license, and without having any legal interest in the soil, *Doe dem. Hanley v. Wood* (b). It was sufficient, therefore, to shew that the defendant had agreed to participate in the profits of working the mine. Now there was evidence to shew that the defendant had entered into an undertaking with others working the mine, to participate with them in the profits of the mine. She had purchased shares, and had spoken of those shares. That is evidence against her that she had an interest in the working of the mine; and if so, then the articles were supplied for her benefit.

(a) See this case reported in 1 *Moody & M., N. P. C.* 96.

(b) 2 *B. & A.* 724.

HONORABLE TENTERDEN C. J. The plaintiff at the time when he supplied the goods, did not know that the defendant either had or thought she had any interest in the mine. He did not, therefore, supply the goods on her credit. The fact of her having thought that she had such an interest, that being wholly unknown to the plaintiff at the time when he supplied the goods, will not make her liable for those goods. Her having expressed an opinion that she was so, might be *prima facie* evidence that she had an interest; but the other facts in the case shew that she had not any interest. She thought she had an interest because she had paid her deposits and received the certificates, but those certificates pass no interest whatever. It did not appear who the directors were, or that they had any authority to issue such certificates. The defendant, therefore, had no interest in this mine, and is not liable in this action.

2015

Rule refused.

but

and

and

and

The KING against KNIGHT and Others.

Tuesday,
November 15th.

INDICTMENT charged, that the defendants, with force and arms wrongfully did stock up and remove, &c. the gravel, soil, and rubbish then being upon and over a certain brick culvert, for the convenience of his majesty's liege subjects, passing therealong in the parish of Studley, in the county of Warwick, opposite to a certain mill there called *Studley Mill*, in a certain king's common highway there, leading from *Studley* in the said county, to *Henley in Arden*, in the same county. The defendants having been convicted,

Indictment charged that defendants removed a culvert in the parish of S. opposite to a mill there, in a highway there, leading from S. to H. Held, on motion in arrest of judgment, that it sufficiently appeared that the culvert removed was in the parish of S.

but

Denman

1827.

*The King
against
Knox.*

Dennis now moved to arrest the judgment, on the ground, that it did not distinctly appear upon the face of the indictment that the road obstructed was in the parish of *Studley*, and he relied upon *Rex v. Gamlingay* (a). There the indictment was against that parish for not repairing a road leading from the parish of *Hatley*, towards and unto the parish of *Gamlingay*; and it was held, that that allegation excluded *Gamlingay*; and, consequently, that the indictment was bad; and that it was not aided by a subsequent allegation, that a certain part of the said highway, situate in *Gamlingay* was in decay. The decision was founded upon an old authority in 2 *Roll's Abr. Indictment* (M) pl. 19., where it is said, that if *A.* is indicted for stopping up a way at *D.* leading from *D.* to *S.*, it is not good, because it does not allege the way to be in *D.*, but from *D.*, which excludes the vill; and in *Mich. 21 Car. 2.* such an indictment was quashed. [Lord Tenterden C. J. I doubt whether that ought to have been considered an authority; for the indictment may have been quashed in order to prevent any question arising.] In *Hammond v. Bremer* (b) the words from and to in a turnpike act were held to be exclusive.

Lord TENTERDEN C. J. The indictment in *Rex v. Gamlingay* (c) differed essentially from that in the present case. It stated that there was and yet is a common and ancient king's highway, leading from the parish of *Hatley*, towards and unto the parish of *Gamlingay*. Here the indictment charges, "that the defendants stocked up and removed the gravel, &c. then being upon and

(a) 5 T. R. 515.

(b) 1 Burr. 576.

(c) 5 T. R. 515.

over a certain brick culvert, for the convenience of his majesty's liege subjects passing therealong in the parish of *Studley*, opposite to a certain mill there, called *Studley Mill*, in a certain king's common highway there, leading from *Studley* to *Henley in Arden*." If we were to construe the words *to* and *from* as exclusive in this case, we should make the allegation inconsistent and insensible, which otherwise is perfectly consistent and sensible. In common parlance, the words *leading from a place*, include as well as exclude that place; and at present my mind is not satisfied with the decision of the Court in the case of *Res v. Gamlingay*, that the words *from* and *to* are necessarily exclusive.

1837.

—
The King
against
Kenyon.

BAYLEY J. The objection in *Res v. Gamlingay* was, that it did not distinctly appear on the face of the indictment that any part of the road was in the parish indicted. The indictment charged that there was and is a common highway leading from the parish of *Hatley* towards and unto the parish of *Gamlingay*. That allegation did not import that any part of the highway was in the parish of *Gamlingay*. The subsequent allegation that a certain part of the same common, highway, &c. situate in *Gamlingay*, was in decay, did not go further, for it referred to the highway mentioned in the former allegation. Lord *Kenyon* there lamented that the Court was under the necessity of coming to the decision which they did in that case. Here we are relieved from that necessity, because in this case there is a distinct allegation that the nuisance was committed in the parish of *Studley*. The words *leading from Studley to Henley* would *prima facie* import that it was in a highway leading from a mill in the parish, and, therefore, must be considered

1827.

The King
against
Knowles.

considered as a highway leading from a village or town
situate in the parish to another place.

Holroyd and Littlebale JJ. concurred.

Thus refused.

and the court to send the case to the jury.

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and the court to send the case to the jury.

and the court to send the case to the jury.

Tuesday,
November 15th.

A customer deposited a sum of money with a banker, and received a note, by which the banker promised to pay the principal at ten days' sight, with three per cent. interest to the day of acceptance.

The banker paid interest on the note, but at the same time told the customer, that he would not, in future, pay more than two and a half per cent., and in his presence altered the terms of the note by striking out three and inserting two and a half. Held, first, that the word "acceptance" meant eight, and that it need not be left with the maker for acceptance; secondly, that the payment of interest was evidence to show that a principal sum was due, and that the note was admissible in evidence to show the terms on which the deposit was made.

Sutton against Thomas.

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and the court to send the case to the jury.

ASSUMPSIT upon a promissory note, bearing date the 15th November 1813, by which the defendant promised to pay ten days after sight thereof to the plaintiff or order, the sum of 250*l.* with interest at the rate of two and a half per cent. per annum to the day of acceptance. Second count, on a similar note payable with three per cent. interest. Counts for attorney fees, &c. Plea, non assumpsit. At the trial before **Bar. G. J.** at the Summer assizes for the county of **Hants** 1827, the following appeared to be the facts of the case. In November 1813 the defendant carried on business as a banker at Southampton, in partnership with two persons, named **Trist** and **Kewer**. The plaintiff on the 28d November 1813 deposited 250*l.* at the bank, and at the same time received the note declared on, which purported to bear interest at the rate of three per cent. per annum to the day of acceptance. The clerk to the bankers, who received the money, proved that the deposit was made on the terms contained in the note. In 1819 the defendant retired from the firm, and was succeeded by one **Trist**, who

continued

continued

continued

continued

continued

continued

continued

continued

continued

continued the business partnership with John and Kellow till 1823, when John died, and then with Kellow alone, who afterwards died insolvent. On the 14th of May 1825 the plaintiff demanded payment of the interest due on the note, and the same was paid up to November 1824, by desire of the defendant. But Pritchard then told the plaintiff that no more than two and a half per cent. would be paid in future, and in the plaintiff's presence he altered the note, by striking out three, and inserting two and a half, and then attached the note to the plaintiff. The plaintiff demanded payment of the principal was demanded of the defendant, and interest at three per cent., and also interest at a half per cent. The defendant requested that the note should be left for a day, which he stated to be the usual custom, and said that unless it was so left he would have nothing to do with it. The person who demanded payment offered to read the note to the defendant, but refused to part with the possession of it. Upon this evidence it was contended by the defendant's counsel, first, that the plaintiff could not sue for the principal, because the note had not been delivered for acceptance, nor had any acceptance been required or given, although it appeared, clearly from the circumstance of the interest being made payable on the day of acceptance, that the parties contemplated that an acceptance should be given on demand. Secondly, that the note, having been altered in a substantial part with the consent of the holder, was not admissible without a new stamp. The Lord Chief Justice overruled the objections, and a verdict was found for the plaintiff.

1827.

Sutton
against
Tosson

1821

remotely A
a few weeks
before he died
he had a letter
from his son
which was found
in his pocket
and which was
supposed to be
a receipt for
the money which
he had given to
his son. The
plaintiff alleged
that the money
was given to
his son for the
purpose of
paying the debt
of the plaintiff.
The defendant
alleged that the
money was given
to his son for
the purpose of
paying the debt
of the defendant.
The court held
that the money
was given to
the son for the
purpose of
paying the debt
of the plaintiff.
The plaintiff was
entitled to recover
the money.

1827.

Sutton
against
Topham

C. R. Williams now moved for a new trial. He contended, first, that it was clear that the parties intended that the promissory note should be left for acceptance in the same manner as a bill of exchange was. [Lord Tenterden, C.J. I should be sorry to suppose that bankers by the word acceptance as used in this note meant that sort of acceptance which is required in a bill of exchange. I think the term acceptance, as used in this note, meant sight.] Secondly, the note was not admissible in evidence at all for want of a new stamp, and the terms upon which the money was deposited could only be collected from the note. The plaintiff by consenting to the alteration, made it a new instrument, and therefore it was not admissible in evidence, *Rapp v. Allatt* (a), and *Rea v. Gillson* (b).

LORD TENTERDEN C.J. I am of opinion that the plaintiff could not recover by force of the instrument itself; but, taking the whole evidence together, I think he might recover on the count for money lent. There was proof of a deposit of money and a promise to pay that money on certain terms contained in a paper in the form of a promissory note. That paper was produced. It contained the terms on which the money was deposited; and it had a stamp required for a promissory note of that amount. Some years afterwards the plaintiff consented that an alteration for the benefit of the defendant should be made in the terms of the instrument. The effect of that alteration was not to make it a security for the principal and two and a half per cent. interest, but to render it wholly invalid

(a) 15 East, 601.

(b) 1 Tinn. 95.

as a security. But although the instrument thereby became void as a security, yet the original loan was not destroyed; nor were the terms on which that loan was made considered void. It was contended that the alteration not only made the security void, but that it extinguished the debt. I think it did not; and that it was competent to the plaintiff to give the paper in evidence to prove the terms on which the money was deposited.

1827.

Secord
against
Tocarra.

Bauman, J. It was proved that interest was paid; that showed that there was a loan of money; the subsequent alteration in the note avoided the security, but the debt was created by the loan. In like manner, taking an usurious security for a pre-existing debt does not avoid the debt, but the security is void, *Mason v. Abdy* (a).

Rule refused.

(a) 3 S. & L. 590.

MILBURN against Codd and Another.

Thursday,
November 15th.

THIS was an action brought by the plaintiff as an attorney to recover the amount of his bill. At the trial before Lord Tenterden, C. J., at the *Middlesex* sittings in *Trinity* term 1827, the following appeared to be the facts of the case. The plaintiff and the defendants had been members of the *London Carriers Company*, which was dissolved on the 2d of May

A., an attorney, and *B.* and *C.* had been members of a trading company. After the dissolution of that company, *B.* and *C.* were sued by creditors of the company, and retained *A.* to defend the actions, and in the course of making that defence a bill of costs was incurred: Held, that *A.*, as a member of the company, being jointly liable to contribute to the expence of defending those actions, could not maintain any action against *B.* and *C.* for his bill of costs.

1827.

1827.

MILBURN
against
Codd.

1826. The defendants being afterwards sued by several of the creditors of the company, employed the plaintiff to defend the actions, and the bill of costs in question was incurred. It was objected by the defendants that the action was not maintainable, inasmuch as the plaintiff and defendants, as copartners, were jointly liable for the sums for which the defendants had been sued, and one partner could not maintain an action against his copartners for work and labour performed, or money expended on account of the partnership, and *Holmes v. Higgins (a)* was cited. The Lord Chief Justice overruled the objection, and a verdict was found for the plaintiff. A rule nisi having been obtained for a new trial,

Denman C. S. now shewed cause. This case is distinguishable from *Holmes v. Higgins*, because the contract between the plaintiff and defendants was made, and the retainer was given, *after* the company had been dissolved, and consequently after the plaintiff and defendants had ceased to be partners.

J. Williams and Goulburn contra. The plaintiff and defendants were copartners. The business was done for the defendants as partners. The plaintiff (as a partner) was liable to contribute to those expences, and if he recovers against the defendant may be sued for contribution.

Lord TENTERDEN C. J. The actions which the plaintiff defended were brought against the defendants

(a) 1 B. & C. 74.

as members of a partnership of which the plaintiff himself was also a member. When the actions were commenced, it was the duty of all the partners to pay the money which the plaintiffs in those actions demanded and recovered, or to resist the actions at their joint expence. The actions were resisted. Supposing the resistance to have been proper (and it is not competent to the plaintiff to say it was not), the expences ought to have been borne by *all* the partners. If the plaintiff were allowed to recover his demand in this action, the defendants would have a right to require him to refund part of it, as his contribution as a partner to the general fund, out of which general fund the actions ought to have been defended. For this reason, I think the present action is not maintainable. The rule for a new trial must, therefore, be made absolute.

1827.

MILBURN
against
Codd.

BAYLEY J. I am of opinion that this action is not maintainable. In this case the plaintiff and the defendants were members of a company, and jointly liable to all just demands on the company, and those demands ought to have been satisfied out of the common fund. Two individuals were selected by the creditors of the company, and were sued. All the members of the company ought to contribute to satisfy those claims, or to resist them. It was the common duty of all the members of the company, if there was any ground of defence, to make that a common cause and to defend the actions, and if there was no ground of defence, to satisfy the demand out of the funds of the company. In this case it was thought right to defend the actions. The plaintiff cannot say it was improper to defend, for he himself con-

1827.

**MILBURN
against
Cox.**

curring in that defence. The expence of such defence ought to fall on the company. Every member of the company, if there are not adequate funds, ought to contribute his proportion to it; and if that be so, every member ought to contribute to satisfy the claim which the plaintiff, as one of the members of the company, has upon its funds. This is, therefore, in effect, a claim of the plaintiff against his partners for contribution, and that is the proper subject of a bill in equity.

LITLEDALE J. I also think this action is not maintainable. The original creditors were entitled to be paid by the whole company, viz. the two defendants, *Milburn* the plaintiff, and the other members. They did not pay, and the creditors brought actions against the two defendants. It was thought advisable to defend the actions, and if they were defended on fair and reasonable grounds, the costs of the defence ought to have been borne by the whole company, the two defendants, *Milburn* the plaintiff, and all the other members. And if that be so, *Milburn*, being a partner, cannot maintain an action against the two defendants to recover the amount of his own bill from these two individuals, for he ought to contribute his proportion. But assuming the defence to have been frivolous and improper, still *Milburn* having been employed as the attorney, must have known the nature of that defence as well as the defendants, and, therefore, he is exactly in the same situation as if the defence was fair and reasonable. If he concurred in a frivolous defence, he being a party liable to contribute as well as the others, cannot maintain this action against either of the two defendants.

Rule absolute.

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PAYNE *against* WILSON, one, &c.Thursday,
November 15th.

ASSUMPSIT. The declaration stated, that at the time of making the promise of the defendant thereafter mentioned, one *C. Vaux* was indebted to the plaintiff in 103*l.* 8*s.*, for the recovery of which the plaintiff had commenced an action against *C. Vaux* in K. B., and in which action *C. Vaux* had signed a cognovit for the payment of the said debt of 103*l.* 8*s.*, together with the costs of the said action, at certain times therein mentioned, to wit, at, &c.; that before the making of the promise of the defendant, *C. Vaux* having made default in payment of the whole of the sum of 103*l.* 8*s.* at the time specified in the cognovit, he, the plaintiff, was about to take proceedings on the cognovit, and thereupon, to wit, on, &c. at, &c. in consideration that the plaintiff, at the request of the defendant, *would consent*, to suspend proceedings against *C. Vaux*, on the cognovit so signed by him, he the defendant undertook and promised the plaintiff to pay to him the plaintiff 30*l.* on account of the said debt, on the 1st of April then next, and a further sum at a subsequent day. Averment, that the plaintiff did suspend all further proceedings against the said *C. Vaux* on the cognovit, of which the defendant had notice. Breach, non-payment of the 30*l.* Plea, the general issue. At the trial before Lord Tenison, C. J. at the *Middlesex* sittings after *Hilary* term 1827, the plaintiff produced in evidence

Assumpsit, in consideration that the plaintiff, at the request of the defendant, *would consent* to suspend proceedings against *A.* on a cognovit, defendant promised to pay 30*l.* on account of the debt (for which the cognovit was given) on the 1st of April then next.

Averment, that the plaintiff did suspend proceedings on the cognovit. The plaintiff, at the trial, proved the following agreement in writing: "The plaintiff having, at my request, consented to suspend proceedings against *A.*, I do hereby, in consideration thereof, personally promise to pay 30*l.* on account of the debt on the 1st day of April." Held, that, as the request must have preceded the consent to

suspend proceedings, the contract might be declared on as an executory contract, and consequently, that there was not any variance. Secondly, that the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least, until the 1st of April. Thirdly, that, after verdict, the averment that "plaintiff had suspended proceedings" was sufficient, without specifying for what period.

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PAYNE
against
WILSON.

the following paper, signed by the defendant, to wit: *Mr. R. Bore* having, at my instance and request, consented to suspend proceedings against the above-named defendant on the cognovit signed by him in this cause, and given for payment of the debt this day, I do hereby, in consideration thereof, personally undertake and promise to pay to the plaintiff the sum of 30*l.* on account of the said debt, on the 1st day of April now next; and the further sum of 53*l.* 8*s.* within four months next ensuing the 1st day of April." It was objected, on the part of the defendant, that there was a variance between the contract proved and that alleged in the declaration; the consideration for the promise stated in the declaration being executory, whereas the consideration *proved* had been executed. Lord Tenterden C. J. directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. *Campbell* in *Easter* term obtained a rule nisi, first for entering a nonsuit on the objection taken at the trial; and, secondly, for arresting the judgment on the ground that no sufficient consideration for the promise was stated in the declaration, it not being alleged that the plaintiff had consented to forbear to sue for any definite time; and also, that it was not properly averred that the consideration was performed.

The *Attorney-General* and *Wightman* now showed cause. There was sufficient proof of the executory consideration stated in the declaration. The proof was, that in consideration of the plaintiff's having, at the request of the defendant, consented to suspend proceedings against *Vaur*, the defendant promised. Now that implies, that the defendant's request to suspend the proceedings preceded the consent given by the plaintiff, and,

and, therefore, this was evidence of a promise made by the defendant, in consideration that the plaintiff would suspend proceedings.

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Campbell contra. The consideration proved in this case was executed; the consideration alleged was executory. There is a material distinction between considerations executory and executed. Executory considerations are traversable, and performance must be avetred with time and place. It depends on the performers of the consideration, whether the promise be binding. If the consideration be executed, the promise is immediately binding; there is no condition or qualification. Here the consideration alleged in the declaration was executory, and it would depend upon the plaintiff's consent to suspend the proceedings whether the defendant's promise were binding. In the contract proved, the consideration was executed. No subsequent consent of the plaintiff was necessary to make the defendant liable. But no sufficient consideration appears in the contract itself, nor is alleged in the declaration; for a forbearance to sue is a good consideration for a promise, only where it is absolute, *Mapes v. Sidney* (a); or for a definite portion of time, *Rish v. Richardson* (b); or a reasonable time, *Johnson v. Whitcomb* (c); forbearance for a little (d) or some time (e) is not sufficient. And even supposing this could be considered as a contract to suspend proceedings for some definite period, it is not alleged that the plaintiff did suspend his proceedings absolutely, or for any definite period of time.

(a) *Cro. Jac.* 683.(b) *Cro. Jac.* 47.(c) 1 *Roll. Abr.* 24. pl. 33.(d) 1 *Roll. Abr.* 23. pl. 5.(e) 1 *Roll. Abr.* 23. pl. 23.

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Payne
against
Wilson.

Lord TENNYSON C.J. I think that the contract stated in the declaration was sufficiently proved by the paper produced in evidence; for it must be implied, from the contents of the paper, that the defendant's promise was made in consideration that the plaintiff would suspend his proceedings against *Payne*. It states that the plaintiff had consented to do so at the request of the defendant. That request, therefore, must have preceded and induced the consent given to suspend the proceedings. Then, as to the objections in arrest of judgment, it is said that it does not appear that the plaintiff consented to suspend the proceedings for any definite time. The promise made by the defendant was to pay 80*l.* on the 1st of *April*, in consideration of the plaintiff's consenting to suspend proceedings. That imports that the proceedings were, at all events, to be suspended until that period; and I think that the averment that the plaintiff did suspend the proceedings is sufficient after verdict, because it must be taken that it was proved at the trial that the plaintiff had suspended the proceedings, either for a time required by law, or for a definite or reasonable time.

BAYLEY J. I think there was no variance in this case. The declaration states, that in consideration that the plaintiff would consent to suspend the proceedings, the defendant promised. Now I think that the fair meaning of that is, "in consideration that he would suspend proceedings, the defendant promised;" and I think that is proved by the paper produced in evidence. I think, also, that it must be taken, after verdict, that the agreement was to suspend until the 1st of *April*, and also that the allegation that he did suspend is sufficient.

LITTLE-

LITTLEDALE J. (a) I am of the same opinion. There is a clear distinction between considerations executed and executory. In *Com. Dig. tit. Action on the Case upon Assumpsit*, B. 12., it is laid down, that "an assumpsit lies though the consideration be executed in part, as in consideration that he had done a thing at my request;" and afterwards it is laid down, "so if the consideration is continuing though the act be executed, as in consideration that the lessee now in possession had paid his rent very well, to save him harmless; for prompt payment of the rent is a continuing consideration when he remains in possession." In the present case, there was a continuing consideration, for the plaintiff not only had consented to suspend the proceedings, but that they should be suspended until the first of April (until the instalments became due). Therefore, this might be alleged in pleading either as an executed or executory consideration; and it was therefore properly described in the declaration. As to the objection in arrest of judgment, I think it must be taken after verdict that the defendant did suspend his proceedings absolutely, or for a reasonable time.

Rule discharged.

(a) Holroyd J. was in the Bail Court.

W. FERRER and ANN ROLLASON against OVEN.

Thursday,
November 15th.

DECLARATION in debt stated that differences having arisen between W. Ferrer and Honoria his wife and Ann Rollason, and the defendant and one L. Lumbe, they, W. Ferrer and Honoria his wife and Ann Rollason, by a bond of arbitration became bound

In debt on an award, the execution of the submission by all the parties must be proved.

to

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FERRER
against
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to the defendant and *L. Lambe*; and the defendant and *L. Lambe*, by a certain other bond of arbitration, became bound to the said *W. Ferrer* and *Honorio* his wife and the said *Ann*, which bonds were conditioned for the performance of an award of two persons therein named, to whom all matters in difference between the parties were referred, provided the award was made within a certain time therein mentioned; but if they did not make their award within the time aforesaid, then of the award of an umpire therein named. Then there followed a stipulation by all the parties to the bonds, that the costs of a suit in Chancery, in which *W. Ferrer* and *H.* his wife and *Ann* were plaintiffs, and the defendant and *L. Lambe* were defendants, and of the reference, and of the award of the arbitrators or umpire, should abide the event of the award; and that the arbitrators or umpire should tax and award the amount of costs to be paid by the party or parties liable. It was then averred, (the arbitrators not having made their award within the time limited,) that the umpire did by his award, (after directing that the defendant should pay a sum of money to *W. Ferrer*, and another sum to *Ann Rollason*,) award that the defendant, his heirs, &c. should pay to *W. Ferrer* and *Ann R.* on, &c. at, &c. 41*l.* 16*s.*, being the amount of costs incurred by *W. Ferrer* and *H.* his wife, and *Ann R.*, in the suit in Chancery, together with the costs of the award. Breach, non-payment of that sum. Plea, nil debet. At the trial before Lord Tenterden C.J. at the *London* sittings after *Easter* term 1827, the plaintiffs proved the defendant's execution of the bond, in which he and *Lambe* were the obligors, and the execution of the award. It was objected that it was incumbent on the plaintiffs to prove that *Lambe* executed this bond, and also the execution of the other bond by the two plaintiffs and

and Mrs. *Farrer*, the submission of the rest being the consideration to each party to submit to arbitration. Lord *Tenterden* C. J. directed the jury to find a verdict for the plaintiffs, but reserved liberty to the defendants to move to enter a nonsuit. *Follett* in last *Easter* term obtained a rule nisi for that purpose.

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FARRER
against
OVEN.

Taunton now shewed cause. It must be conceded that *Antram v. Chace* (a) establishes that where an award is declared upon and is offered in evidence, the submission by all the parties interested must be proved. But this case is distinguishable from that. For here it did not appear that *Lambe* had any interest. In *Antram v. Chace* all the parties had an interest in the subject matter, for they were co-partners in trade. The execution of the submission by one was induced by the expectation that the instrument would be executed by the others.

Follett, contra, cited *Dilley v. Polhill* (b), 2 *Williams's Saunders*, 61. n. 2., *Biddell v. Dowse* (c), to shew that where an award is sought to be enforced, it is necessary to allege in pleading a binding submission by all the parties.

LORD TENTERDEN C. J. These authorities shew that it was necessary for the plaintiffs to give evidence of the execution of the bond by themselves. The rule must, therefore, be made absolute.

BAYLEY J. I do not see how to get over the objection. It was necessary for the plaintiffs to allege a mutual submission by all the parties. There was no suffi-

(a) 15 *East*, 209.(b) 2 *Str.* 922.(c) 6 *B. & C.* 255.

1827.

Plaintiff
against
Defendant.

cient evidence of the execution of the bond by the plaintiffs. I think also that they should have proved the execution of the bond by *Lamb*. The defendant might not have consented to refer unless the others had joined. It appears by the submission, that *Lamb* had an interest in the Chancery suit. I hope the decision in this case will have the effect of inducing parties to declare on the arbitration bond. By declaring on the award, the plaintiff takes upon himself the onus of proving a mutual submission. By declaring on the bond, he transfers the burden of proof to the defendant; for it lies on the latter to discharge himself from the penalty by shewing a performance of the conditions.

HOLROYD J. *Dilley v. Polhill* (a) is an authority to shew that it was necessary for the plaintiff to allege a mutual submission. That being a material averment, it ought to have been proved.

Rule absolute. (b)

(a) 2 Str. 923.

(b) See 2 Stark. on Ev. 187.

Friday,
November 16th.

SOLARTE and Others, Assignees of ALZEDO, a
Bankrupt, against MELVILLE and Another.

Where a broker carried bills to be discounted, and allowed to the person discounting interest at the rate of 5l per

cent. per annum, and in addition, 1l. per cent. on the amount of the bills towards the payment of a debt due from a third person, but which the broker thought himself bound in honour to pay, and the broker accounted to his principals for the whole amount of the bills, minus lawful discount and commission: Held, that the transaction was not usurious.

ASSUMPSIT on several bills of exchange accepted by the defendants and indorsed to *Alzeda* before his bankruptcy. Plea, non-assumpsit. At the trial before Lord Tenterden C. J., at the London sittings

after

after *Hilary* term 1827, it appeared that the bills in question were drawn by *Makby* and Co., payable to their order, and accepted by the defendants. *Makby* and Co. employed one *Bramley*, a bill-broker, to get them discounted. *Bramley* had for some years been in the habit of getting bills discounted by the bankrupt. In 1822, he carried to him for discount bills to a large amount, accepted by *Wagstaffe* and Co., and these he guaranteed, and represented *Wagstaffe* and Co. to be opulent and responsible persons, (which he then believed to be the fact,) in consequence of which *Alzedo* was induced to discount for *Wagstaffe* and Co. bills that did not come through *Bramley*'s hands, and to which his guaranty did not apply. In *January* 1823, *Wagstaffe* and Co. failed, and at that time *Alzedo* had a claim of more than 4000*l.* upon bills discounted for them, and guaranteed by *Bramley*, and a still larger sum upon bills taken immediately from them, and with which *Bramley* had not any connexion. After this failure of *Wagstaffe* and Co., *Alzedo* ceased to do business with *Bramley* for some months. The latter then addressed a letter to him, stating that he could bring some perfectly good bills, and that if he was willing to discount them at 5 per cent. he should also deduct 10 per cent. from the amount towards the dishonoured bills of *Wagstaffe* and Co. which he (*Bramley*) had guaranteed. To this *Alzedo* assented, and they continued to transact business upon these terms until the whole sum guaranteed by *Bramley* was paid off. Then *Bramley* wrote another letter to *Alzedo*, expressing his regret that he should sustain any loss through the representations that he had made of *Wagstaffe* and Co.'s solvency, and that he felt bound in honour to pay their debt if he could; that he would bring

bills

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Solemnly
against
Makby.

1837.

SOLAMER
against
MICHAEL.

bills and other documents which he had discounted at 12 per cent. and which he had paid for the debt of Waggstaff and Co. and the bills in question were, amongst others, discounted upon the said terms. The defendant further asserted, that, although the Court made deductions, first of 10 per cent. and then of 1 per cent. amounting above the 5 per cent. discount, Brumley was to be credited to his employers for the whole amount after deducting only lawful discount and constitutionally with the defendant it was contended, that the dealing between the bankrupt (defendant) and Brumley was usurious; and that, therefore, the assignees of the former could not be entitled to recover upon the bills which he had discounted upon such terms. The Lord Chief Justice told the jury, that in his opinion the transactions were not usurious if Brumley really considered himself bound in honour to pay the debt of Waggstaff and Co. and the deductions over and above the lawful discount were made in order to effect that object, without any pretence of contrivance to allow the 5 per cent. per cent. upon the discount; and with that allowance the Lord Chief Justice left the case to the jury, who found a verdict for the plaintiff. In Easter term a rule nisi for a writ of mandamus was granted, on the ground that the opinion given at the trial by the Lord Chief Justice was not enforceable. The Attorney-General, Brougham, and Russell shewed cause. The verdict of the jury is decisive of the question; for they have, in effect, found this question in favour of the plaintiff, between Brumley and the bankrupt, that the latter should have more than 5 per cent. discounting the bills. When the bills were discounted, Brumley might lawfully pay out of the proceeds part of

his debt to the lender discharging. Neither had his employment given to him with that; he had a right to relieve from the broker the whole amount of the bills, without lawful discount and commission; and to that extent always, in fact, accounted with his employers. If, indeed, the alleged bargain between Bramley and the bankrupt had been a mere contrivance to secure the discount more than lawful discount, the case would have been different; but that has been negatived by the evidence and the question was properly left to their decision, *Edwards v. Yee* (a), *Carstairs v. Scots* (b).

NOTE.
Edwards v. Solicitor-General and Gurney contra. It has been contended that the transaction with the bankrupt could not be usurious, because he did not receive more than the lawful rate of 5l. per cent. per annum upon the bills from the party to whom they belonged, but from the broker. If that argument were valid, no bargain between the discount of a bill and the broker could ever be usurious. But the statute 12 Ann. c. 16. says, that usurers shall, upon any contract, take directly or indirectly, for the loan of any monies, &c. above the value of 4 per cent. for the forbearance of 100l. for a year, &c. This is said as to the person from whom the money must be taken to be within the statute; it therefore applies as strongly to payments made, or sums allowed by the broker, as to those made by his principal. The giving taking more than lawful discount is equally guilty of usury, whether he takes it out of the pocket of the principal or the agent. But it is said that the excess taken by the bankrupt was by way of payment of

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 SOCMAN
 against
 MELVILLE.

to pay: (a) 1 B. & P. 144. (b) 4 M. & S. 192.
 Vol. VII. F f a debt.

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SOLARTE
against
MELVILLE.

a debt. Admitting that the broker might have lawfully paid his own debt out of the proceeds of the bills, this case is very different. He was under no legal obligation to pay *Wagstaffe's* debt; and if in order to induce the bankrupt to discount the bills he agreed to allow discount at the rate of 5*l.* per cent. per annum, and in addition a sum of 1*l.* per cent. on the amount which he was not under any legal obligation to pay, the only reasonable construction of such a bargain is, that the whole was in truth paid as a consideration for the loan of the money advanced on the bills; and if so, it was usurious. There is no case to warrant the opinion expressed by the Lord Chief Justice, that if *Bramley* thought himself bound in honour to pay *Wagstaffe's* debt, the transaction was not usurious; and the finding of the jury in consequence of the opinion so expressed ought not to bind the defendants; for whether the facts of a case establish usury, that is not answered by the finding of a jury that the parties meant to act legally, (*Marsh v. Martindale* (a), *Barnard v. Young* (b)).

Clarinda v. Holt.
The question in this case was whether the bills on which the plaintiffs had commenced their action against the defendants as acceptors, were tainted by usury. They had been discounted through the intervention of a broker of the name of *Bramley*, who before the discounting of the bills had represented to *Alcedo*, the bankrupt, by whom they were discounted, that in consequence of his having recommended to the bankrupt one *Wagstaffe*, for whom

Lord TENTERDEN C. J. The question in this case was, whether the bills on which the plaintiffs had commenced their action against the defendants as acceptors, were tainted by usury. They had been discounted through the intervention of a broker of the name of *Bramley*, who before the discounting of the bills had represented to *Alcedo*, the bankrupt, by whom they were discounted, that in consequence of his having recommended to the bankrupt one *Wagstaffe*, for whom

(a) 5 B. & P. 154.

(b) 17 Ves. 44.

Alsedo had discounted bills, but who failed, so that *Alsedo* had incurred great loss, he, *Bramley*, felt himself under an honorary, though not under a legal obligation, to make good that loss. The mode which he proposed in order to effect this object was, that as he could not pay the whole at once (for he otherwise would have done so), he (*Alsedo*) should go on discounting for him, and should deduct from the sums to be paid to him (*Bramley*) on such discounts 1*l.* per cent.; but, nevertheless, *Bramley* was not to deduct that 1*l.* per cent. from the persons who employed him, but to account to them for the full amount, deducting only ordinary interest. I left to the jury the question whether they were of opinion that *Bramley* thought himself under an honorary obligation, intimating to them as my opinion, that in case they thought *Bramley* acted under an idea honestly formed in his own mind, that he was under an honorary obligation to pay the money, I was inclined to think that, in point of law, it was not an usurious contract. I still incline to think that if *Bramley* did feel himself under an honorary obligation, the contract was not usurious; and I believe some of my learned Brothers are of the same opinion, though one of them differs from me. We are all, however, agreed, that notwithstanding I did intimate to the jury my opinion upon the subject, yet as I left it to them to exercise their own discretion, and to draw their own conclusion from the evidence, we ought not to disturb this verdict; and that more especially as this is a case in which, if the usury be established, the penal consequences are heavy. The rule for a new trial must, therefore, be discharged.

Rule discharged (a).

(a) See *Stonold v. Eade*, 4 Bing. 81.

1827

SOLANGE
against
McEVILLE.

1827.

Friday,
November 16th.

GREENWAY and Another *against* FISHER.

Where a verdict in trover was obtained in vacation against a trader, who, after the first day of the next term, but before final judgment was signed, became bankrupt:

Held, that final judgment signed afterwards during the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate.

SCIRE facias on a judgment in trover. Plea, bankruptcy and certificate of the defendant, and that the cause of action in the writ of scire facias mentioned, to wit, by the recovery of the damages therein mentioned, accrued to the plaintiffs before defendant became bankrupt. Replication, that the said cause of action did not accrue to the plaintiffs by the recovery of the said damages before the defendant became bankrupt. At the trial before Lord *Tenterden* C.J. at the *London* sittings after last *Easter* term, it appeared that the action of trover was tried on the 20th of *April* 1824. *Easter* term in that year commenced on the 5th of *May*. On the 8th of that month the defendant committed an act of bankruptcy; on the 13th a commission of bankrupt issued against him; and on the 18th he was declared a bankrupt. On the 19th, final judgment was signed in the action of trover; and on the 25th of *November* following, the defendant obtained his certificate. For the defendant it was objected, that the debt was barred by the certificate, for that it might have been proved under the commission. Lord *Tenterden* thereupon directed a verdict to be entered for the plaintiffs, and that the defendant should move to enter it for the defendant. In *Trinity* term a rule nisi for that purpose was obtained, against which

The *Attorney-General* and *Chitty* now shewed cause, and contended, that the rule as to the relation of judgments

ments was often productive of great hardship, and ought not to be extended. That hitherto it had only been applied to cases of contract; and that the judgment in this case, being in an action of tort, was distinguishable from that in *Ex parte Birch* (a).

1827.

GREENWAY
against
FISHER.

Campbell, contra, was stopped by the Court.

LORD TENTERDEN C. J. I am of opinion that this rule must be made absolute. At common law all judgments related to the first day of the term in which they were entered up, in like manner as all acts of parliament related to the first day of the session in which they were passed. I take one reason for this to have been, that there was not any mode of ascertaining the precise time at which judgments were signed. By the statute of frauds this rule of law was altered for one purpose, and now the Court can, for that purpose, ascertain and notice the time when judgments are actually signed. So, if by the words of an act of parliament, the commencement of its operation is confined to a particular day, that may be noticed by the Court. But with the exception of those instances the old rule of relation still prevails. Nor does it work any injustice; for if the certificate is a bar to the action, it follows, as part of the same rule, that the creditor might have proved his claim under the commission against his debtor.

BAYLEY J. The judgment for damages in an action of trover cannot be distinguished from a judgment in an action of assumpsit brought to recover unliquidated da-

(a) 4 B. & C. 880.

1827:

Gazetway
against
Fryman.

mages. The present case is, therefore, precisely similar to *Ex parte Birch*, and the creditor having had the power to prove under the commission, is barred by the bankrupt's certificate.

Rule absolute.

Friday,
November 16th.

The KING against The Inhabitants of FYLINGDALES.

Where a magistrate presented a road in the township of *F.*, "upon the information upon oath of *A. B.*, surveyor of the highways for the township of *C.*, which is thirty-five miles distant from the township of *F.*," &c.: Held, in arrest of judgment, that this presentment was bad; for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in *C.* had no authority under the 13 G. 3. c. 78. s. 24. to give information as to the road in *F.*

A ROAD in the township of *Fylingdales*, in the North Riding of the county of *York*, was presented in the following form: — "*I, W.*, one of the justices, &c., by virtue of the statute in such case made and provided, upon the information, upon oath, of *W. R.*, surveyor of the highways for the township of *Thornton-le-Bell*, in the North Riding of the county of *York*, which township is thirty-five miles distant from the township of *Fylingdales*, doth present, &c." The road was then described, in the usual manner, as a public highway in the township of *Fylingdales*, and out of repair. Plea, not guilty. At the trial before *Bayley J.*, at the *Yorkshire Lent* assizes, 1827, the defendants were found guilty; and in *Easter* term a rule nisi for arresting the judgment was obtained, on the grounds that the presentment was not averred to be made upon information upon oath given to the presenting magistrate, and that the magistrate had no power to act upon information given by the surveyor of *Thornton-le-Bell*.

The *Attorney-General* and *Alexander* now shewed cause. Two objections have been taken to this presentment; first, that it is not alleged that the information upon

upon oath was given to the magistrate who made the presentment; but that must be presumed after verdict. Secondly, that the surveyor who gave the information appears not to have been surveyor for the township of *Dylingdales*. Whether that be necessary or not, depends upon the construction to be put upon the 13 G. 3. c. 78. s. 24. by which it was enacted, "that every justice of the peace shall have authority, either upon his own view or upon information upon oath to him given by any surveyor of the highways, to make presentment," &c. No authority can be found, deciding that the information must be given by the surveyor of the district, in which the road lies; nor can any argument in favour of that construction be derived from the convenience of the thing; nor from other parts of this statute. A stranger is more likely to form an unprejudiced judgment as to the state of the road, than the surveyor of the district, to whom the want of repair may partly be imputed. In several other parts of this statute, where the duties of the surveyor are specified, his authority is expressly limited to the district over which his office extends. Thus, in section 12., certain powers are given to surveyors as to the highways, trunks, tunnels, plate, hedges, ditches, &c. *within the parish or place for which they shall be appointed surveyors*; and a similar expression occurs in section 16., relating to the widening of roads, and in section 26. as to erecting direction posts. The absence of any such description of the particular surveyor in section 24. raises a presumption that the power of giving information was not intended to be limited to the surveyor of the district, and according to the literal meaning of the words of the enactment, the power now contended for is certainly given.

1837.

The King
against
The Inhabit-
ants of
DYLINGDALES.

1827.

The King
against
The Inhabitants of
Fylingsdale.

J. Williams (with whom was *Starkie*) contra. Supposing the question in this case to be merely one of form, still, as there is no appeal, the judgment must be arrested. It is a question of jurisdiction, and the justice must shew that he had jurisdiction, otherwise his proceeding must fall to the ground: no intendment can be made in favour of it. Now it is quite consistent with all the averments on this record, that the information was not given by the surveyor to the presenting magistrate. (He was then stopped by the Court.)

Lord TENTERDEN C. J. There is much weight in that observation. For any thing that appears, the information might have been given by affidavit made before another magistrate, and he might have handed it over to the person who made the presentment. And we are all of opinion, that the other objection is valid. The expression, "any surveyor," in the twenty-fourth section, must be construed with reference to the known duties of a surveyor, and they are limited to the district for which he is appointed. It is impossible to suppose that the legislature intended to give to the surveyor of the highways in one parish, any authority over the whole country.

BAYLEY J. Where an act of parliament gives certain authority to a person, describing him by his name or office, that enactment applies to him only within the limits over which his office extends. It is, therefore, clear that this presentment is bad, and that the judgment must be arrested.

Rule absolute.

1827.

ALLISON, Gent., one, &c., against RAYNER.

Saturday,
November 17th.**A ASSUMPSIT** for work and labour, as an attorney.

Plea, non-assumpsit. At the trial before *Hullock B.*, at the *Yorkshire Lent* assizes 1827, it appeared that the action was brought by the plaintiff, an attorney, to recover the amount of his bill of costs incurred in a cause in which the defendant had sued in the character of assignee of an insolvent debtor, that the business was done, and that the defendant had promised to pay; but it did not appear that the plaintiff had called, or advised the defendant to call a meeting of the creditors, or to obtain the approbation of one of the commissioners of the insolvent debtor's court; and the plaintiff's clerks, who were called to prove that the business was done as charged, did not know that any such steps had been taken; nor was there any charge in the bill relating to such proceedings. The statute 1 G. 4. c. 119. s. 11. enacts, "that no suit in law be proceeded in further than an arrest on mesne process by any assignee of any prisoner's estate and effects, without the consent of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice to be given, at least fourteen days before such meeting, and without the approbation of one of the commissioners of the said court." It was objected by the defendant's counsel, that as the plaintiff had not proved that he had advised the defendant to call a meeting of the creditors, or to obtain the approbation of one of the commissioners, he could not recover in this action. The learned

The statute 1 G. 4. c. 119. s. 11. enacts, that no suit in law be proceeded in further than an arrest on mesne process by any assignee of an insolvent's estate, without the consent of creditors and approbation of one of the commissioners of the insolvent court: Held, in an action brought by an attorney to recover his bill of costs incurred in an action at the suit of such an assignee, that it was incumbent on the attorney to prove that the consent of creditors and the approbation of one of the commissioners of the insolvent court had been obtained, or at all events that he had informed his client that such consent was necessary.

Judge

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Judge directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Jones Serjt. now shewed cause. The 1 G. 4, c. 11, s. 11. prohibits any suit from being proceeded in farther than an arrest on mesne process, without the consent of creditors, and the approbation of one of the commissioners. The continuing an action beyond an arrest without such consent and approbation, may be a ground for an application to the Insolvent Court to order the assignee not to proceed further, but cannot affect the attorney's right to be paid by his client. In *De la Spence v. Clark* (a), the Court of Common Pleas held that the provisional assignee of an insolvent debtor might, without the approbation of one of the commissioners of the Insolvent Debtor's Court, maintain an ejectment for property assigned to him; and an application to stay proceedings, on the ground that it had not been proved at the trial that such authority had been obtained, was refused. An attorney who is employed by an assignee to proceed with an action, is not bound to ascertain or to inquire whether such assignee has authority. The assignee may proceed at his own risk: he may employ an attorney, and he cannot afterwards say that the responsibility of such proceeding is that of the attorney. [Lord Tenterden C. J. But should not the client be apprized of the risk he runs?] That is not necessary, because the act is a public act, and the assignee must be presumed to be acquainted with its enactments. But assuming that it was the duty of the plaintiff to have given the notice to the creditors, and to have obtained

(a) 5 Bing. 203.

the sanction of one of the commissioners, his neglect in that respect is no defence to the action, but the subject of a cross action, *Templar v. M'Lachlan* (a). The plaintiff's *prima facie* case, at all events, was complete by proof of the retainer, of the business done, and of a promise by the defendant to pay; and the affirmative as to the omission complained of rested with the defendant.

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RAYNER.

Pollock (and *Patterson* was with him), contra, was stopped by the Court.

LORD TENTERDEN C. J. It is a very important part of the duty of this Court, to take care that an attorney shall fairly and honestly discharge his duty to his client. Here an attorney was employed to conduct business on the part of an assignee of an insolvent debtor. It was part of the duty of the attorney to inform the assignee, that if he proceeded in an action without the consent of the creditors, he would be liable to pay the costs of such action out of his own pocket. That being the duty of the attorney, the question is, Whether, when he brings an action to recover the amount of his bill of costs incurred in a suit, it lies upon him to shew affirmatively that he has done all that he ought to have done; or whether it lies upon the client to shew negatively that the attorney has not done his duty? I think that the affirmative proof lies upon the attorney; and, therefore, that in order to sustain this action, he ought to have proved that he did all that the act required to be done, in order to entitle the assignee to proceed in the action.

BAYLEY J. *Templar v. M'Lachlan*, is distinguishable from the present case, as there it was not impossible

(a) 2 N. B. 136.

that

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that the defendant might, at some future time, receive benefit from the work of the attorney. Here, for any thing that appears, the defendant, through the plaintiff's negligence, has lost all chance of being reimbursed the expences incurred, as he will not be entitled to retain for those expences out of the insolvent's effects. There was indeed evidence that no such steps as are required by the statute had been taken; for there was no charge in the bill for attending a meeting of creditors, nor did the plaintiff's clerks know that any such meeting had taken place.

HOLROYD J. It was the attorney's duty to secure his client against any loss he might sustain through a neglect of the preliminary measure required by the statute, or to apprise him that he ran the risk of incurring that loss.

Rule absolute.

In Cases. v. The Est. 3. Nov. 1827.

CHARLES ASHBY against ANN ASHBY and THOMAS ASHBY, Executrix and Executors of CHARLES ASHBY, deceased.

A count in assumpsit for money had and received by defendant, as executor, to the use of the plaintiff, cannot be joined with a count for money due to plaintiff from defendant, as executor, upon an account stated with him or money due from him as executor.

Seemle, That a count for money paid by plaintiff to the use of defendant, as executor, may be joined with such a count on an account stated.

ASSUMPSIT. The first count of the declaration stated that the defendants, as executrix and executor, were indebted to the plaintiff in 500*l.* for so much money by the plaintiff paid, laid out, &c. to and for the use of the defendants as such executrix and executor at their request. And being so indebted, the

defendants,

defendants, as executrix and executor, promised the plaintiff, to pay him the said sum of 500*l*. Second count stated that the defendants, as such executrix and executor, were indebted to the plaintiff in other 500*l*. for so much money by the defendants, as such executrix and executor, had and received to and for the use of the plaintiff; and being so indebted, they, the defendants, as executrix and executor, promised, &c. Third count, that the defendants, on, &c. at, &c. as executrix and executor, accounted with the plaintiff of and concerning divers other sums of money from the defendants, as such executrix and executor as aforesaid, to the plaintiff before that time due and owing. And upon that account the defendants, as such executrix and executor, were found to be indebted to the plaintiff in the further sum of 500*l*. And being so found indebted, they, the defendants, as executrix and executor as aforesaid, in consideration thereof, promised, &c. Breach, non-payment. Demurrer and joinder.

1827.

 ASSET
 against
 ASSET.

Miller in support of the demurrer. There is a misjoinder of counts, because the first and second counts charge the defendants personally, and will sustain a judgment de bonis propriis only; whereas the third count charges them in their representative character, and will require a judgment de bonis testatoris. There is no case in which it has been expressly decided, that a count for money paid to the defendant's use as executor will charge him de bonis testatoris, but *Rose v. Bowler* (a) and *Trotter v. Graham* (b) are authorities to shew, that an action against an executor for money lent to him as executor will not warrant a judgment de bonis testatoris.

(a) 1 H. BL. 109.

(b) 7 Tunt. 381.

There

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There is no difference between the case of a loan of money to an executor, to be applied by him to the purposes of his testator's estate, and a payment of money at an executor's request for the purposes of the estate. The principle to be collected from the cases is, that an executor cannot, after the death of his testator, enter into a contract to bind his estate. Now, here, the count for money paid raises a new cause of action not existing at the time of the death of the testator, and founded on a contract made by the executrix and executor. In *Wigley v. Ashton* (a) it was held, that a count in assumpsit against husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay rent, could not be joined with counts upon promises by the husband and wife as administrators, for use and occupation by them after the death of the testator, the defendants in the one case being personally liable; in the other only to the extent of assets. So in *Childs v. Monins* (b), it was held that executors were liable personally on a promissory note drawn by them as executors, because it was a new contract on their part to which their testator was no party. Then as to the second count, *Rose v. Bowler* (c), *Jennings v. Newman* (d), *Brigdon v. Parkes* (e), *Powell v. Graham* (f), 2 *Will. Sound.* 117 d. establish clearly, that that count charges the executors in their personal character, and warrants a judgment *de bonis propriis*.

Judicial count. The plea of *plene administravit* might be pleaded to all the counts, and they would all warrant

(a) 3 B. & A. 101.

(b) 2 Bro. & B. 490.

(c) 1 H. Bl. 108.

(d) 4 T. R. 347.

(e) 2 B. & P. 424.

(f) 7 Taunt. 580.

a judg-

a judgment *de bonis testatoris*. It was decided in *Ord v. Farnwick* (a) that a count on a promise to the plaintiff as executrix for money paid by her to the defendant's use, may be joined with another count on promises to the testator, and the same rule ought to apply in actions against, as well as by executors. That case, therefore, shows that the first count may charge the defendants in their representative character. The second count also may be joined with the third, for although there is an apparent contradiction in the cases upon this subject, and in some of them, where the defendant has been charged on promises made by him as executor, he has been held to be liable *de bonis propriis*, yet Gibbs C. J. in *Powell v. Graham* says, that "a count on a promise by the defendant as executor, has no force further to charge the defendant than a count on a promise of the testator;" if so, the second count in the present case will only charge the assets of the testator, and may be joined with the others.

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 against
 Assnt.

LORD TENTERDEN C. J. I am of opinion that the judgment in this case must be for the defendant. There is no doubt as to the count on the account stated, that a plea of *plene administravit* would be a good plea, and that the only judgment which could be given in favour of the plaintiff, would be a judgment *de bonis testatoris*. As to the count for money paid, there may be some doubt; but it is unnecessary to pronounce any decision upon that, because the cases cited clearly establish that the count for money had and received cannot be joined with counts against a party in his character of executor. In those cases, the count for money had and received is

(a) 5 East, 104.

1827.

ASHBY
against
ASHBY.

treated as shewing a personal charge on the executor. If the matter were quite new, I am not sure it might not be as well to hold that a plaintiff might elect to treat the receipt of the money as an act done by the defendant in his character of executor, and take his chance whether he would get paid out of the assets or not. If he elected so to treat it, then he must shew that the money came into the defendant's hands because he was executor. But the count for money had and received being a personal charge on the executor, to which *plene administravit* cannot be pleaded, and on which the judgment must be *de bonis propriis*, and the count on the account stated being of a contrary character, it appears to me that there is a misjoinder, and consequently that there must be judgment for the defendant. Although there may be some doubt on the first count, the strong inclination of my opinion is, that that count is good as against an executor; that the latter might plead *plene administravit* to it, and that the judgment should be *de bonis testatoris*.

BAYLEY J. I do not know how to get over the authorities. If we had not been bound by these authorities, I should have thought that all the counts would have charged the defendants in their character of executor and executrix, and that every one of them was rightly so framed. There may be cases in which the creditor may be entitled at his option either to sue the party in his personal or his representative character. And where, as in this case, he makes his election to charge the defendants in the latter character, if the right stated in each count, would be a right binding the assets of the testator, it would be very reasonable

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against
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to say that they might be joined. In the first count of the declaration before us, the money is stated to have been paid by the plaintiff to the use of the defendants, as executor and executrix of the testator. That imports that the plaintiff has paid it not on the personal account of the defendants, but that he has paid it for them, because they were executor and executrix; that is, as it seems to me, in release of something which otherwise would have been a burden on the assets of the testator. I think that the plaintiff, having paid the money to the use of the defendants, as executor and executrix, has the same rights that, before such payment, belonged to the person to whom it was made, and, consequently, that he (the plaintiff) may charge the assets of the testator. To put a plain case, suppose two persons are jointly bound as sureties, one dies, the survivor is sued and is obliged to pay the whole debt. If the deceased had been living, the survivor might have sued him for contribution in an action for money paid, and I think he is entitled to sue the executor of the deceased for money paid to his use as executor. A plaintiff in many instances may have an advantage in proceeding against the assets rather than against the executor personally. The executor in his individual capacity may be insolvent; in his character of executor he may have assets adequate to answer any claim; and when the money is paid to his use as executor, justice requires that the person who has made that payment should have the liberty of looking to the fund which the executor has in that character. The second count is for money had and received by the defendants as executor and executrix. That I consider as money received by them in consequence of

1887.

Action
against
Admin.

their being situated and situated in which would not otherwise have come into their hands. Such a case may occur. Suppose a bill payable to the testator were remitted from a foreign country, half the amount applicable to the personal use of the testator, and the other half to be paid over by him to some other person. Before the bill arrives, the testator dies, and his executor receives the money. It is possible that he may not have received advice as to the mode in which it is to be applied, until after he has applied it in the ordinary course of administration. He may be insolvent in his individual capacity, and it would be hard that the party, under such circumstances, should not have his election to be paid out of the funds of the testator. If the question, therefore, were new, I should be disposed to think that an action for money had and received by the defendant in his character of executor, might, at the election of the party for whose benefit it was received, charge the assets of the testator, and might, therefore, be joined with other counts of that description. How a court of error will deal with a case of this description, I can form no judgment. But the authorities on the point are certainly so strong, that I feel myself bound by them, and, therefore, concur in the judgment of the rest of the Court, not because my reason is convinced, but because I feel myself bound by those authorities.

HOLROYD J. It appears to me clearly established by the authorities, that the different counts in this declaration cannot be joined. The second count is framed on a cause of action arising wholly in the time of the executor, in a case for money had and received by them to

1824

*Notes
Agates
Aunt.*

the use of the plaintiff. If that be the plaintiff's money, he is entitled to it, whether there be assets or not, and whether the executor and executrix have or have not applied to other purposes the money which was received to the plaintiff's use. If that count had stood alone in the declaration, charging the defendants as executor and executrix, the plaintiff might, according to the authorities, have had judgment generally against them, which would be *de bonis propriis*, and not *de bonis testatoris*. If that be so, then the only remaining question is, Whether the other counts are of a similar description? It is quite clear, that on the third count the only judgment that could be given would be *de bonis testatoris*. That count being on an account stated of money due and owing from the defendants, as executor and executrix, the only proof admissible in support of the cause of action stated in that count would be, an account stated respecting debts due from the testator himself. As to the first count, there may be some doubt. I however think, that, upon the authorities cited, the judgment on that count might be *de bonis testatoris*.

iii LIVERPOOL J. There may be some doubt as to the first count of this declaration; for although, generally speaking, *plene administravit* cannot be pleaded to a charge subjecting a defendant to a personal liability, yet a case may be put where an action may be brought by a plaintiff against a defendant in his character of executor, for money paid to his use. Suppose that a plaintiff had become bound jointly with a testator, and after his death had paid the whole debt; I should think that an action against the executor for money paid to

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against
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his use might be supported, and that the plaintiff would be entitled to judgment de bonis testatoris. As to the third count, there can be no doubt that it charges the defendants in their representative character, and that the plaintiff is entitled to have judgment de bonis testatoris. The question for us mainly arises on the second count, in which the defendants are charged with having received money in their character of executor and executrix. The question is, Whether that makes the defendants liable in their representative character, so as to warrant a judgment de bonis testatoris. All the authorities shew that such a count only makes the defendant liable personally; and it appears to me, that if the case were perfectly new, that would be the correct view of the law upon the subject. Upon the death of a testator an executor is bound to pay his debts in a certain order; first, debts due to the crown, then judgment debts, then specialty debts, and, lastly, debts on simple contract. But these last must be debts of the testator. In this case there never was any simple contract debt owing from the testator. The debt stated in the declaration is a debt contracted by the defendants, in their character of executor and executrix, by their having received a sum of money to be paid over to the plaintiff. That is a debt not contemplated by the law in the rule laid down as to the order in which debts are to be paid. If the testator in his lifetime had been indebted to the plaintiff for money had and received to his use, there would not be any specific appropriation of the money so received to the plaintiff's use; but that money, on the death of the testator, would have gone into his general funds, and the debt must have been paid out of those funds in its regular order. But where an executor receives money

money to the use of a particular individual, it operates as a specific appropriation of that money belonging to the party, and he, in his individual capacity, must be liable for the money so received: it has nothing to do with the accounts of the testator. For these reasons, I am of opinion that the second count cannot be joined with the third, and that the judgment, therefore, must be for the defendants.

Judgment for the defendants.

1837.

Assnt
against
Assnt.

JOSEPH BEETE against HENRY FISHER BIDGOOD.

Tuesday,
November 20th.

A ASSUMPSIT on the following promissory note: —

London, 10th March 1821.

On the 1st July 1825, we promise to pay to *Joseph Beete Esq.*, his executors or administrators, at the house of *Messrs. Sandbach, Tuine, and Co., of Liverpool*, the sum of 3968*l.* for value received, in second instalment, with interest included, as expressed and specified in agreement for the sale of his moiety in plantation *Meten Meer Rong*, in the colony of *Demerara*, to *John Newton*.

John Newton.

H. F. Sloane.

Where a contract was made for the sale of an estate at a certain price, and it was agreed that this should be paid by instalments at certain future days, with interest, calculated at 6*l.* per cent. per annum; and promissory notes were given for these sums, compounded of the instalments and that which was called interest: Held, that the whole must be considered as the purchase-money of the estate, and that the bargain was not usurious.

Plea, the general issue. At the trial before Lord *Tenterden C. J.*, at the *Guildhall* sittings before *Michaelmas* term 1828, a verdict was found for the Plaintiff, subject to the opinion of this Court on the following case: . . .

The note in question was signed by the defendant, who then bore the name of *Sloane*, but afterwards changed it to *Bidgood*; the signature of *John Newton*,

1628

Barth
ag. Beete
Droghda

the other maker of the promissory note, was also proved; and that he died before the commencement of the action. The note was duly presented for payment on the day it became due at the house of Messrs. Sandbach, Tine, and Co. of Liverpool, mentioned in the said note, and payment was refused.

The agreement referred to in the note, and the account made out, settled, and signed between the parties at the time, were as follows :

The former recited " that *Joseph Beete* hath contracted and agreed with the said *John Newton* for the absolute sale to him of the undivided moiety or half part of him the said *Joseph Beete*, of and in the plantation called *Meten Mere Zorg*, and the lands in *Masseronie*, and all the buildings, cultivation, slaves, furniture, cattle, and other appurtenances, plantation, and husbandry implements and utensils, and all coffee and other stock on hand, and every thing, of what denomination soever, thereunto belonging or appertaining, without any exception whatever, at or for the price or sum of 16,000*l.* sterling money of *Great Britain* (being the balance of an account already drawn and stated by the said *Joseph Beete* and *John Newton*, and intended to be signed upon the said *Joseph Beete's* signing the special power of attorney hereinafter mentioned); which said sum of 16,000*l.*, together with interest upon the several promissory notes added thereto for the time they have to run, and which are wrote and stated at the foot of these presents, and to be dated respectively the 10th day of this instant month of *March*, and delivered to the said *Joseph Beete* upon his signing and delivering the said special power of attorney, are to be in full of the

said purchase money; and the said *John Newton* hath agreed to purchase of the said *Joseph Beete* his the said *Joseph Beete's* undivided moiety or half part of and in the said plantation lands, buildings, cultivation slaves, furniture, cattle, stock in hand, and every thing thereunto belonging and hereinbefore mentioned, the property of the said *Joseph Beete*, at or for the said price or sum of 16,000*l.*, to be paid at the times, including the said interest to be added thereto, by the instalments, and in the manner specified in the said several promissory notes stated at the foot of these presents, as agreed upon, between the said *Joseph Beete* and *John Newton*." The agreement then contained a declaration that plaintiff, for the considerations therein mentioned, did sell, &c. (the premises hereinbefore specified) to *John Newton*; and he thereby agreed to execute on the 10th of *March* (the date of the note) a power of attorney to *A. B.* and *C.* to pass a legal transport of the estate, &c. to *Newton*, according to the existing laws of the colony. At the foot of the articles of agreement there was the following memorandum, signed by the plaintiff: "I, the undersigned *Joseph Beete*, do hereby acknowledge to have received of and from the said *John Newton* the seven several promissory notes hereinafter mentioned, respectively signed by the said *John Newton* and *Henry Fisher Sloane*, being the amount of the said sum of 16,000*l.*, the money agreed upon for the said purchase, and the balance of the said account stated between them, the said *Joseph Beete* and *John Newton*; as aforesaid, together with interest on the said sum of 16,000*l.* added thereto for the time the respective bills have to run, making in the whole principal and interest 20,890*l.*, that is to say," (copies of the promissory notes were then added). The account stated between

1827.

Barre
against
Bumoon

1877

Barr
against
Bischoff

the parties debited John Newton with 15,000*l.*, of the sum which he agreed to pay for the plaintiff's interest in the *Matai Meer Zorg* plantation, and then gave credit for several sums of money amounting in the whole to 9,000*l.*, and the balance in favour of the plaintiff was stated at 16,000*l.* The interest mentioned in the several promissory notes set forth at the foot of the agreement (of which the note in question was the fourth) was after the rate of 6 per cent. per annum, being the legal interest for money in the colony of *Demerara*.

The question for the opinion of the Court was, Whether the transaction was or was not usurious.

Armstrong for the plaintiff. There is nothing usurious in the contract between these parties. The statute 12 *Ann.*, c. 16, applies only to the loan or forbearance of money; *Barclay v. Walsley* (a); whereas the contract in this case was for the sale of an estate at a certain price, to be paid by instalments. It is true, that the estimated value of the estate, if paid for immediately, was 16,000*l.*; but that did not make it usurious to contract for a price to be paid at a future period, which exceeded the 16,000*l.* and 6 per cent. interest. If, indeed, the transaction were colourable, the imputation of usury might be established; but there is no doubt that a real sale of the estate was intended, and the mode of calculating the price will not make the contract usurious; *Hoyer v. Edwards* (b), *Doe v. Brown* (c). No question could have arisen but for the word *interest* introduced into the agreement; that, however, will not make illegal a bargain which is in substance legal. The sale was,

(a) 4 *East*, 55.(b) 1 *Cramp.* 119.(c) *Holt*, N. P. C. 295.

in fact, made for the promissory note. The only forbearance of money would be, of the sum secured by the notes after they became due; for such forbearance no amount of interest was expressly reserved, the notes would, therefore, bear legal interest only; and this circumstance completely distinguishes the present case from that of *Dewar v. Span (a)*, where, for the purchase-money of an estate, a bond bearing 6 per cent. interest was given.

1827.

Baron
against
Benson.

Rutten v. contra. The note upon which this action is brought was given in performance of an usurious agreement. It is, upon the face of it, expressed to be "for value received in second instalment, with interest included, as expressed and specified in agreement for sale," &c. Looking at that agreement, it appears that the consideration-money to be paid for the estate was 16,000*l.*; and it was further agreed, that it should bear interest at 6 per cent., up to certain future days appointed for payment of the principal sum. A power of attorney was to be given for the immediate transfer of the estate; it must, therefore, be taken, that the sum of 16,000*l.* then became due, and that the further sums agreed to be paid were for the forbearance of the 16,000*l.* If so, the bargain was clearly usurious, for notes were given for sums greatly exceeding the principal sum due, together with lawful interest up to the time at which payment was deferred. It appears, also, by the account stated between the parties, that the value of the estate was computed at 25,000*l.*; then credit was given for certain items of cash, amounting to 9000*l.*;

(a) 3 T. R. 426.

1827,

BETTER
against
BIDG008.

the remaining 16,000*l.* must, therefore, have been considered as a cash balance then due, and the further payments could only be made for the forbearance of that sum. The case of *Floyer v. Edwards* was very different; there goods were actually sold, to be paid for at a certain time; there was no engagement by the seller to grant any forbearance, and the larger price which the buyer was afterwards to pay, in case he made default, was considered as a penalty. In that case, too, the Court placed some reliance upon the usage of the particular trade, — a doctrine which it appears very difficult to support. [*Bayley J.* When did the money become due which you say was forborne by the plaintiff?] Immediately on the settlement of the account and the transfer of the estate: the plaintiff might, then, but for the promissory notes, have maintained an action for the amount.

Lord TENTERDEN C. J. The case which is now presented to the consideration of the Court, arises out of a contract for the sale of an estate, and not for the loan of money. The agreement was founded partly upon what was considered the present price of the estate, and partly upon what was considered its price if paid for at a future day. The only difficulty has been occasioned by calling the difference between these two prices interest; but it is our duty to look, not at the form and words, but at the substance of the transaction; and here on the one hand, we should not pay attention to the words of the contract, if the substance of it went to defeat the provisions of the statute of the 18*th* Anne, c. 16*th* so, on the other hand, we ought not to rely upon the words, so as to defeat the contract, if in substance the

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transaction was legal. It appears to me, that in substance this was a contract for the sale of the estate at the price of 20,800*l.*, to be paid by instalments; in that there was no illegality. The defence set up, therefore, fails, and the *postea* must be delivered to the plaintiff.

1827.

—
BETTER
against
BIDGON.

Postea to the plaintiff.

CLEMENT against FISHER.

Wednesday,
November 21st.

(In Error.)

THIS was a writ of error from the Court of Common Pleas. The first count of the declaration stated, that on, &c. at, &c. one *J. J. Stockdale*, falsely, wickedly, and maliciously did print and publish of and concerning the plaintiff, a false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, that is to say, &c. It then set out the libel published by *Stockdale*, which imputed gross misconduct to the plaintiff; and then stated, "that in *Hilary* term in the 6 & 7*th* of 4., the plaintiff below brought his action against *Stockdale* for publishing that libel, and obtained a verdict and judgment for 700*l.* damages; that the defendant well knowing the premises; but contriving, &c. to injure the plaintiff in his good name, and to cause it to be believed that the said libel was true, heretofore, to wit, on, &c. at, &c. falsely and maliciously did print and publish of and concerning the plaintiff, and of and concerning the said libel, and of and concerning the said verdict,

Declaration stated, that defendant, contriving, &c. did print and publish of and concerning the plaintiff a libel containing the false and scandalous matter following, without alleging that that matter was of and concerning the plaintiff, and then set out the libel, which, on the face of it, did not manifestly appear to relate to the plaintiff, and there was no innuendo to connect it with the plaintiff:
• Held, upon writ of error, that the count was bad.

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CLAWSON
against
EMERY.

verdict, a certain false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, defamatory, and libellous matter following; that is to say." It then set out the libel, upon which no question turned. The second count stated; "that the defendant further contriving, &c. on, &c. at, &c. falsely, wickedly, and maliciously did print and publish of and concerning the said plaintiff, and of and concerning the said first-mentioned libel, and of and concerning the said verdict, a certain other false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory, and libellous matter following, that is to say." It then set out the libel, which purported to be a dialogue between *Stockdale* and a person named *Harriette*. There was no innuendo showing that it related to the plaintiff, nor did it appear from the subject-matter to relate to him, nor did it appear necessarily to relate to the libel in the first count; but it alleged, that it would be hard to pay for truth, and that all which *Harriette* had written was in substance true. The defendant below pleaded not guilty. At the trial the jury found a general verdict for the plaintiff, with thirty pounds damages; and judgment having been entered up for the plaintiff generally on all the counts, the record was removed into this court by writ of error, and on a former day in this term the case was argued by

• *Platt* for the plaintiff in error. The second count is bad, and the damages being general, the judgment must be reversed. The second count alleged, that the defendant "published of and concerning the plaintiff a libel containing the false and scandalous matter following."

The

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GRANBY
against
FARMER

The libel was then set out; but it was not any where alleged that the matters in the libel were of and concerning the plaintiff; nor did it appear by the subsequent matter, nor was there any innuendo to connect the libellous matter with the plaintiff. Now, although the defendant may have published a libel concerning the plaintiff, it does not follow that the libel set out was concerning the plaintiff. That ought to appear either by avowment or from the libel itself. He cited *Rea v. Marsden* (a), *The King v. Alderton* (b), *Johnson v. Aglomax* (c), *Longfield v. Bancroft* (d), *The King v. Horne* (e), *Hewkes v. Markey* (f), *Com. Digest, tit. Action upon the Case for Defamation, G. 7.*

Manning contra. The declaration states that the defendant published the libel of and concerning the plaintiff. In *Rea v. Marsden*, it was not alleged that the libel was published of and concerning the plaintiff. The count might have been bad on special demurrer, for not stating that the libellous matter was of and concerning the plaintiff, but is good after verdict, for the plaintiff could not have recovered a verdict unless it had been proved at the trial that the libel did relate to him. *Sennel v. Hogg* (g), *Skinner v. Grafton* (h).

Cib. adv. ult.

Lord TENTERDEN C. J. We are of opinion that the second count is bad. The first count of the declaration states, that the plaintiff had brought an action against

(a) 4 M. & S. 164.

(b) *Sayer*, 280.

(c) 10 M. & W. 130.

(d) *See* 554.

(e) *Case*, 682.

(f) 8 East, 487.

(g) 1 *Sound.* 226.

(h) 1 *Sound.* 228. c.

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CLEMENT
against
FISHER.

one *Stockdale* for a libel, and obtained a verdict against him, and that the defendant contriving, &c. to injure the plaintiff, and to cause it to be believed that the libel was true, published of and concerning the plaintiff a libel, which is set forth in that count. Upon that no question arises. The second count then proceeds thus: "the plaintiff further saith, that the defendant, further contriving and intending as aforesaid, heretofore, to wit, on, &c. falsely, &c. did print and publish of and concerning the plaintiff, and of and concerning said first-mentioned libel, and of and concerning the said verdict, a certain other false, scandalous, malicious, and defamatory libel, containing, among other things, the (first) scandalous, malicious, defamatory, and libellous matter following, that is to say," without alleging that that particular defamatory matter which was afterwards set out was matter of and concerning the plaintiff. Such an allegation would not have been necessary if there had been in the libel set out any thing which clearly applied to the plaintiff, or any distinct innuendo so applying the libellous matter, or if, upon the perusal of the matter set out, it had manifestly appeared that it related to the libel in respect of which the plaintiff had recovered damages. But looking at the libellous matter set out in this count, we find the initial letters of Mr. *Stockdale's* name, and the name of *Harriette*, and the libel alleges that it would be hard to pay for truth, and that all that which *Harriette* had written was in substance true. Now, upon reading that matter, it seems to me quite impossible to say that it has any relation to the plaintiff or to the former libel. There is no averment that the particular matter is of and concerning the plaintiff, or any innuendo shewing that it related to the plaintiff, or any thing

thing in the matter itself manifestly shewing that it does relate to him. We are, therefore, of opinion, that the count is not good. The consequence is, that the judgment must be reversed, and a venire de novo awarded.

Judgment of the Court of Common Pleas reversed, and a venire de novo awarded.

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The KING against MARY SOMERTON.

Wednesday,
November 21st.

INDICTMENT charged that *Mary Somerton*, late of the parish of *Purton*, in the county of *Somerset*, on the 1st of *March* 1827, at the parish aforesaid, in the said county, being then and there servant to one *Joseph Hellier*, on the same day and in the year aforesaid, with force and arms at, &c. one ring, &c. then and there belonging to and in the possession of the said *Joseph Hellier*, and then and there being the goods and chattels of the said *Joseph Hellier*, then and there from the possession of the said *Joseph Hellier*, feloniously did steal and take against the peace, &c. The defendant was found guilty at the Summer assizes for the county of *Somerset*, and was adjudged to be transported beyond the seas for the term of fourteen years. The record having been removed into this Court by writ of error, the errors assigned were, that the indictment did not warrant the judgment, inasmuch as it was not sufficiently alleged or shewn, that the prisoner was the servant of the said *Joseph Hellier*, or that the prisoner was the servant of the said *Joseph Hellier* at the time of the committing of the larceny. The case was now argued by

An indictment charged that *A. B.*, on, &c., being the servant of *J. H.*, on the same day, &c., one gold ring, &c., then and there being in the possession of *J. H.*, and being his goods and chattels, feloniously did steal: Held, that the fair import of the charge was, that *A. B.* was the servant of *J. H.* at the time when the theft was committed, and that the indictment therefore warranted judgment of transportation for fourteen years.

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The King
against
Somerton.

Bompass Serjt. for the prisoner. The judgment of transportation for fourteen years is not warranted by the indictment, unless the prisoner was the servant of *Hellier* at the time when she committed the theft. First, it is not sufficiently averred that the prisoner was the servant of *Hellier*. The charge in the indictment must be direct and positive, *Rex v. Crowhurst* (a), *Rex v. Whitehead* (b). Here there is no direct and positive charge that the prisoner was the servant of *Hellier*. The allegation is, that "she being the servant of *Hellier* did steal." That is not sufficient. Where the participle is connected with the verb it is an averment of a fact; but here the participle is unconnected with the verb which follows; *Long's* case (c). [Lord Tenterden C. J. *Mary Somerton* is the nominative case to the verb *steal*, and the words "being the servant of *Hellier*," are a description of the person of *Mary Somerton*. That is a sufficient allegation that she bore that character.] Assuming that to be so, it is not sufficiently averred that the prisoner was the servant of *Hellier* at the time when she stole the goods. The allegation is, that she, on the 1st of *March* 1827, being servant, on the same day, and in the year aforesaid, did steal. In *William's* case (d) the indictment charged, that he, on the 18th of *January* aforesaid, assaulted *A. Porter*, with intent wilfully and maliciously to spoil her garments; and that he, on the said 18th day of *January*, did maliciously tear her clothes. The indictment was held to be bad, because, for any thing that appeared to

(a) 2 Ld. Raym. 1363.

(b) Salt. 371. 2 Hawk. P. C. b. 2. c. 25. s. 61.

(c) 5 Coke, 120.

(d) Leach's C. L. 4th edn. 599. and 1 East, P. C. 424.

the contrary, the assault might have been on one part of the day and the tearing of the clothes on another. That case is precisely in point. Here the defendant may have been the servant of *Hellier* in the early part of the day, but not his servant at the time when the theft was committed. When time becomes material, it ought to be specially averred; and as it is not averred here, that the prisoner was the servant of *Hellier* at the time when the theft was committed, the Court ought not to intend it, *Francis's case* (a), *Keat's case* (b); for the matter of an indictment ought to be full, express, and certain: it is not to be maintained by argument or intendment; *Vaux's case* (c), 2 *Hawkins P. C.* c. 25. s. 60., *Rex v. Cheere* (d), *Rex v. Stevens* (e).

Jeremy contra. The indictment is framed upon the 3 *G. 4. c. 38. s. 2.* The statute does not alter the character of the offence, but only increases the punishment. It is necessary to shew that the party at the time of committing the theft was in the capacity of a servant, in order to apportion the punishment. The rule laid down as to the precision and certainty required in indictments, applies to distinct substantive acts which either per se or united constitute the crime. In *Hawkins P. C.* b. 2. c. 25. s. 61. it is stated to have been adjudged, "that where an indictment finds that *J. S.* exists of such or such a degree or trade, &c. as brings him within the purview of the law whereon the indictment is founded, committed such a fact, it shall be intended that he was of such degree, &c. at the time of

(a) 2 *Str.* 1015.(b) 5 *Mod.* 288. *Skin.* 666.(c) 4 *Co.* 44.(d) 4 *B. & C.* 902.(e) 5 *B. & C.* 246.

CASES IN MICHAELMAS TERM

1837.

*The King
against
Hawkins*

the fact, without any express allegation to that purpose, because that is the most natural construction of the participle *exists* going before the verb to which it is the nominative case." And in *Ward's case*(a) it was expressly decided, that in a criminal information a participle applying to the person of the offender, in the same sentence with and preceding the charge, shall be referred to the time when the offense is stated to have been committed, if it is not expressly referred to any particular time.

Lord TENTERDEN C.J. It is impossible that any person who reads this indictment can doubt that it imports that *Mary Somerton* was the servant of *Hollier* when she stole the property. I agree that we cannot by intendment or argument supply any thing which goes to constitute the guilt of the prisoner, or which may warrant a specific punishment in any particular case. But we must read and understand the language and the intendment as the rest of mankind would understand the same language, if it were used in other indictments, with the exception of those cases where we are bound to use technical terms to be used, as in the case of a murder. If we were to hold that the allegation that we stole a day the prisoner, being the servant of a certain man on the same day steal the goods of a certain man did not import that she stole his goods at the time when she was his servant, we should expose ourselves to that reproof expressed by a very learned and very humane Judge, viz. that it is a disgrace to the law that criminals should be allowed to escape by nice

(a) 1 Ld. Raym. 1461. Str. 747.

and captious objections of form. The judgment must be affirmed.

1827.

—
The King
against
Somerton.

BAYLEY J. The case of *Rex v. Ward (a)* is in point, except that in this case there is a date given to the time when the prisoner was the servant of *Hellier*, which was unnecessary. I am of opinion that we are bound to construe the whole taken together, as an allegation that the defendant was servant at the time when the offence was committed.

LITTLEDALE J. It seems to me that the allegation is sufficient. In *Com. Dig.*, tit. *Indictment*, G. 5. under the head "what is sufficient certainty," it is said to be sufficient if the indictment allege "quod *A.* existens such an officer of such an age, &c. fecit, without saying *tunc existens*; for where this word relates to the person, and is not collateral, it shall have a general construction." The question in this case arises from the introduction of the words "on the same day and in the year aforesaid." But it seems to me, that this, which is merely unnecessary matter, does not alter the sense, and that the judgment ought to be affirmed.

Judgment affirmed

(a) 2 *Ld. Raym.* 1461. *Str.* 747.

1827.

Wednesday,
November 21st.

Where a bill of exchange, payable *after sight*, having been presented for acceptance and refused, and duly protested, was eight days afterwards accepted by a third person for the honour of the drawer, and when at maturity, according to that acceptance, was presented for payment both to the drawee and the acceptor for honour: Held, in actions against the latter and the drawer, that these presentments for payment were made at a proper time, and that a protest for nonpayment by the drawee was unnecessary.

But it was held necessary that presentment to the drawee for payment should be averred in the declaration; and for want of such averment judgment was arrested.

ANN WILLIAMS against GERMAINE the Elder.
Same against GERMAINE the Younger.

THE former of these cases was an action by the plaintiff against the acceptor of a bill of exchange for the honour of the drawer. In the first count of the declaration it was stated, that *Germaine the younger*, on the 20th of April 1826, in parts beyond the seas, at, &c., drew a bill of exchange for £12.11s. 9d. upon Messrs. *Pugh and Redman, London*, payable, thirty days after sight, to the order of one *Henry Williams*, who indorsed it to the plaintiff; that on the 20th of May, in the same year, at, &c., the bill was presented to *Pugh and Redman* for acceptance, who then (and there) had sight of it, but did not, nor would then, or at any time before or afterwards, accept the same, or pay the sum of money therein mentioned, but wholly refused so to do. That the bill was duly protested for non-acceptance, whereof the defendant, on, &c., had notice; and thereupon the defendant, on, &c., at, &c., in order to prevent the said bill from being sent back and returned to the drawer, did, under the said protest, accept the said bill, and make it payable at No. 6, Old Court, Old Broad Street; and delivered the bill so accepted and indorsed to the plaintiff. That the bill, when it became due, to wit, on the 22d of August, was duly shown and presented at the place where it was made payable by the said acceptance, and payment of the sum of money therein mentioned was duly demanded, according to the tenor and effect

1827.

WILLIAMS
against
GERMAINE.

effect of the bill, and of the acceptance and indorsement; but that neither the defendant, nor any person on account of the defendant, or the drawer, did, or would, pay the bill, &c. The second count was similar, with the exception that defendant's acceptance was stated as a general acceptance under protest, and not making the bill payable at a particular place. The third count stated an acceptance by defendant, payable at 6. *Union Court*, for the honour of the drawer, without averring a previous presentment to the drawees. The fourth count varied from the third, as the second from the first. Plea, the general issue. At the trial before Lord *Tenterden* C. J., at the *Guildhall*, sittings after *Michaelmas* term 1826, it appeared that the bill was drawn abroad by *Germaine* the younger, and indorsed by the payee to the plaintiff. On the 13th of *July* it was presented to the drawees for acceptance, and protested for non-acceptance. On the 20th of the same month *Germaine* the elder accepted the bill for the honour of the drawer, and this appeared on the face of the bill. On the 22d of *August*, when, according to the acceptance, the bill became due, it was presented for payment to the drawees, and to the acceptor for honour, and dishonoured and protested for non-payment. Notice of the non-acceptance and subsequent dishonour of the bill when presented for payment was not given to the drawer; but his residence being unknown, it was conceded that the holder was not bound to give it. *Ranke*, for the defendant, objected that it was incumbent on the plaintiff to prove a due presentment for payment to the drawees, and protest for non-payment before the acceptor for honour could be called upon to pay. *Hoare* v. *Clarnow* (a), and that the pre-

(a) 16 *East*, 591.

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WILLIAMS
against
GERMAINE.

sentment to the drawees was not at the right time, for that the bill being made payable at a certain time after sight, was at maturity as against the drawees on the 14th of *August*, but it was not presented to them for payment until the 22d.

The second action was against the drawer. In this case the evidence was the same, and the same objection was taken to the plaintiff's right to recover. The Lord Chief Justice overruled the objection, and the plaintiff had a verdict in each case, the defendant having leave to move to enter a nonsuit. *Parke* in *Hilary* term 1827 renewed his objection to the plaintiff's right to recover, and contended that the case of *Hobart v. Cazenove* was a direct authority in his favour, unless it should be held that there was some sound distinction between a bill payable after sight, and one payable after date, or between actions against a drawer and indorser. The holder, by neglecting to present the bill to the drawees for payment at the time when it was due, according to the time when they had sight of it, gave time to them without the assent of the acceptor for honour, or of the drawer, who were thereby discharged.

Lord TENTERDEN C. J. I am of opinion that there is not any sufficient ground for the motion, either on behalf of the drawer or the acceptor. This was a bill payable thirty days after sight. On the 12th of *July* it was presented for acceptance, and that having been refused, it was duly protested; but, the drawer's address not being known, notice could not be given. The bill was then taken to *Germaine* the elder, and on the 20th of *July* he accepted it for the honour of the drawer. Thirty days elapsed, and then, the usual days of grace having

having been allowed, it was presented to the original drawees, and to the acceptor for honour, but both refused payment. The first question is, Whether the drawer is liable under these circumstances? It is not necessary to decide on the effect of an acceptance for honour, where no presentment for payment is made to the drawees. Here presentment was made to them at the time when the bill became due, according to the acceptance for honour, and I think that sufficed. This circumstance distinguishes the present case from *Hoare v. Cazenove*. The bill in that case was payable at a certain period after date, and no presentment for payment was ever made to the drawee; the decision, therefore, cannot be cited as an authority for saying that a bill should, under the circumstances proved in this case, be presented for payment to the drawees, and to the acceptor for honour, at two different times. Such a rule might be prejudicial to the acceptor for honour, and in the present case it would have compelled the holder to present the bill to the drawee eight days before the expiration of the time allowed to the actual acceptor for payment.

Parke then moved in arrest of judgment in each case, on the ground that the declaration did not aver a presentment for payment to the drawee and protest for non-payment, but only to the acceptor for honour; and upon this point a rule nisi was granted, against which, on a former day in this term,

Campbell shewed cause, first, in the action against *Germaine*, the elder. The engagement of an acceptor for honour is absolute, not conditional; it was, therefore, unnecessary to present the bill for payment to the drawee.

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Secondly,

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 WILLIAMS
 against
 GRAMMAINE.

1827.

Witnesses
against
GERMAINE.

Secondly, supposing that to be necessary, still the declaration is sufficient after verdict. This case is distinguishable from that of *Hoare v. Casenove*, the bill being made payable after sight, whereas in that case it was payable after date. If the two cases had been precisely similar, it would have been difficult to get over that authority, although the reasons given in support of the decision are not satisfactory. Ex vi terminis, an acceptor is in a different situation from a drawer or indorser; but the acceptor for honour is placed in the same situation as those parties, according to the decision referred to, which, indeed, professes to proceed on authority, and not on the convenience of the thing; and, looking at the authorities cited, they do not appear to warrant the judgment there given. *Beaves Lex Mercatoria Bills of Exchange*, s. 43. is cited, which is an express authority for saying that the obligation of the acceptor for honour is absolute, not conditional (a). Then *Lutw. v. Brunetti* (b); *Malyne*, p. 278., and *Pothier Contrat de Change*, part 1. c. 5. s. 197. are referred to, as proving the reverse. The first of these was an action by the first indorser, for whose honour the bill had been paid, against the acceptor for honour. The custom was set out on the record. [Bayley J. Lord Ellenborough, commenting on the custom set out, says: "That two protests i. e. for non-payment as well as non-acceptance, were in this case held necessary by the custom of merchants."] No point was made about the second protest or protest. It is true, his Lordship observes, that no objection was made to the custom as stated; but

(a) But see the 48th section, which appears to explain and qualify the 43d in the manner suggested by Lord Ellenborough in *Hoare v. Casenove*.

(b) *Lutw.* 896.

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WILLIAMS
against
GERMAINE.

no objection could be made to it on a writ of error. Then, as to the passages quoted from *Malme* (a), it is plain, taking the whole together, that he is speaking of that which is necessary in order to give the payer for honour a remedy over, and not of that which is necessary to make the acceptor for honour liable to the indorsee of the bill (b). Nor is it by any means clear, that *Eskins* in the passage referred to, *Contrat de Change*, part 1, c. 5, art. 2, is discussing the exact point now before the Court (c); it would rather seem that he is pointing out the steps necessary to make third persons liable after non-payment by an acceptor for honour. The reason of the thing certainly is not in favour of the objection. The holder of the bill, out of indulgence to the drawer, allows a third person to accept for his honour; it would be hard if, on that account, he were bound to take the extra trouble of presenting it a second time to the drawee. Besides, if that were so, presentment must be made, both to the drawee and the acceptor for honour, on the day when the bill becomes due; but this would be impossible if the parties lived at any considerable distance from each other. Secondly, if a second presentment to the drawee were necessary, still the declaration is sufficient after verdict. It states that the bill was duly presented, and payment demanded; but that could not be true, unless it were presented both to the drawee and the acceptor for honour, if such presentment be necessary. In *Solomon v. Stacey* (d), it was held, that the omission of an allegation of protest was only matter of form,

(a) Page 275. (b) See *Vanderwall v. Tyrrell*, 1 M. & M. 87.

(c) See part 1. c. 4. art. 5.

(d) Doug. 684. n. 144.

and

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and could not be taken advantage of on general demurrer. If, without proof of such presentment at the trial, the plaintiff was not entitled to recover, then, after verdict in his favour, it must be presumed (as was the fact) that such proof was given; and then the omission in the declaration is aided, according to the cases cited in 1 *Wm. Scud.* 238. n. (1). As to the other case, there is no real difference between the action against the drawer and against the acceptor for his honour.

Parke contrâ. The only question for the Court is, whether *Hoare v. Cazenove* were rightly decided or not; and it is very important to adhere to decided cases on questions of commercial law, for subsequent contracts are made on the faith of them. The only authority cited on the other side, as at variance with that decision, is *Beaves Lex Merc.*; but that was noticed by Lord Ellenborough, and fully answered; and he assigns very sufficient reasons for the judgment then pronounced by the Court. Then it was said, that *Hoare v. Cazenove* is not supported by the case of *Brunetti v. Levin*; but the custom there set out on the record agrees with that which is now contended for, and it must be taken to have been proved as laid. A difficulty was also suggested, arising out of the supposed necessity of presenting to the drawee and acceptor for honour on the same day; but there is no authority for saying that the presentment to both must be on the same day, and the law always allows a reasonable time for the performance of that which it requires to be done. [*Bayley J.* In *Hoare v. Cazenove* the acceptance was for the honour of the indorser.] Every indorser is in effect a new drawer; and although that was a bill payable after date, and this

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is payable after sight, the principle of the former decision, viz. that the undertaking of the acceptor for honour is conditional only, is equally applicable to both, and cannot be affected by the mode of ascertaining the time of payment. The case, *Rushton v. Aspinall* (a), disposes of the next point that was made; and the argument as to the effect of the averment, that the bill was *duly presented* to the defendant, is answered by *Everard v. Paterson* (b), where, in an action on a bond, conditioned for the performance of an award, so as it was made *under the hands* of the arbitrators, it was averred that the arbitrators did *in due manner duly* make their award in writing; and on error this was held insufficient. In the other action against the drawer, *Pothier*, part 1. c. 5. s. 137., is a clear authority for the defendant, even supposing him to be treating of that which is necessary to charge third persons, as has been suggested.

Cur. adv. vult.

The judgment of the Court was now delivered by Lord PENTECOST C. J. There were two cases argued yesterday of *Williams* and *Germaine* the elder, and *Williams* and *Germaine* the younger; *Germaine* the elder being the acceptor of a bill of exchange for the honour of the drawer, and *Germaine* the younger being the drawer of the bill. The objection taken in arrest of judgment was, that the declaration did not allege that when the bill arrived at maturity, that is, at the expiration of the time after it was exhibited to the drawee, it was ever presented to that drawee for payment, or protested for non-payment. In support of the

(a) Doug. 680. (b) 2 Marsh. 204.

objection,

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objection, counsel relied on a case in *16 East, Moore v. Cazenove*. That case underwent grave consideration by this Court, which, at that time, was filled by very learned Judges, the assistance of one of whom we have the satisfaction of having at the present moment. In the course of the argument much was addressed to us to shew that that judgment ought not to have been given. If we could have been convinced that a judgment given even by persons of the description to which I have alluded, was founded on a mistake of the law, it would have been our duty to have decided contrary to it; but we ought not to overrule a solemn decision of the Court unless we perfectly concur in saying that such judgment was founded on a mistake. It is of great importance in almost every case, but particularly in mercantile law, that a rule once laid down and firmly established and continued to be acted upon for many years should not be changed unless it appears clearly to have been founded upon wrong principles. If however, the matter were new, I am by no means prepared in my own mind to say I should not have come to the same decision, although I should have paused before I pronounced a judicial opinion on the subject, longer than, having that authority before me, I think it necessary to do. Whatever is requisite to enable a person who has accepted a bill for the honour of another to call upon that person to repay him, and to enable him to recover over against such person, may also be reasonably held necessary to enable another party to recover against such an acceptor for honour. For if you could recover against an acceptor for honour by proof of less than will enable him to recover against the party for whom he accepts, there would be an inconsistency; for

it

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against
GERMAINE.

it might be said with some reason, that if the acceptor for honour chose to pay without requiring all the proof from the holder which would be necessary for him to recover against the drawer, the payment would be made in his own wrong, and he would not be entitled to recover over. It seems to me, therefore, that the same rule as to proof which prevails in the case of an acceptor for honour, in suing a party for whose honour he accepts, must also be observed when the holder of a bill sues the person so accepting. The result, as it seems to me, of the decision to which I have alluded is, that an acceptance for honour is to be considered not absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, keep this bill, don't return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me, and you shall have the money. This appears to me to be a very sensible interpretation of the nature of acceptances for honour, where the parties say nothing upon the subject. In an action by the holder against the drawer of the bill, to be sure he has a right to say, if you keep it till its time has run out, you ought to have presented it to the person on whom I drew it, and have seen whether on the presentment he would pay; whereas, you refuse to do so, and have relied on an acceptance by some person for my honour made without my authority. We think that we are bound by authority, and I am inclined to say by reason, to confirm the decision in *Harve v. Goshove*; consequently the rule for arresting judgment in this case must be made absolute.

Rule for arresting judgment made absolute.

1827.

Wednesday,
November 21st.

in *add. to* *Grasholt*
1. G. 2. Nov. 27-

WHITFE, Assignee of the late Sheriff of ~~Essex~~,
against ~~Oldaker~~ and Two Others.

When the sheriff is ruled to bring in the body, proceedings cannot be taken on the bail-bond until that rule has expired; and if bail above are justified before that time, the bail below may, in an action on the bond, plead *comperuit ad diem*, and that plea is satisfied by the production of the recognizance roll, containing an entry of the defendant's appearance generally.

Such roll may be made up at any time before the day given for producing it.

THE plaintiff issued a latitat into *Essex*, against the defendant *Oldaker*, returnable on *Monday* next after fifteen days of *St. Hilary*, the 29th of *January*. *Oldaker* was arrested, and gave bail to the sheriff. On the 5th of *February* bail above was put in. On the 6th, an exception was entered, and notice of it given, and the sheriff was ruled to bring in the body. On the 8th notice of justification of the bail before put in was given for the 10th. On the same day a second notice was given for the 12th, and on that day the bail justified, and a rule for the allowance was duly served. On the morning of that day an assignment of the bail-bond was taken, and process issued in this action. A declaration on the bail-bond was delivered on the 14th day of *Easter* term. The defendants pleaded, *inter alia*, *comperuit ad diem*; plaintiff replied *multiel record*, and gave a rule to produce the record on *Monday* next after fifteen days of the *Holy Trinity*, when the defendants produced a recognizance roll, wherein, after setting out a bill supposed to have been exhibited by the plaintiff against *Oldaker*, on *Tuesday* next after eight days of *St. Hilary*, the appearance of the defendant was entered generally, and not of any particular day. This roll was not docketed or filed until the 26d of *June*, when it was docketed and filed as of *Hilary* term. Upon the production of this roll, judgment was entered for the defendants, that they had produced the record according

ing to the rule given. In the same term a rule nisi was obtained to set aside that judgment, and enter for the plaintiff judgment that the defendants had failed in producing the record; or that the appearance of the defendant *Oldaker* should be entered on the roll according to the fact, on the day when it took place.

1827.

 WHITTLE
 against
 OLDAKER.

Campbell and *Rowe* shewed cause, and contended, that by ruling the sheriff to bring in the body, the plaintiff had given time for justifying bail until the expiration of that rule; for that the sheriff would have been protected had the bail justified on the 12th of *February*. No attachment could have issued against him until that time, and, therefore, he was not damnified by the circumstance of bail not being justified on an earlier day. His assignee could not be in a better situation, and, therefore, had no right to sue until after the expiration of the body rule.

Marryat and *Reader*, contra, contended that although the sheriff could not have been attached until the body rule expired, yet the party was bound to put in and justify bail within four days after exception, *Bond v. Evans* (a). The defendants had no right to make up and bring in a roll not warranted by the real facts of the case; and unless the Court order the record to be amended according to the truth, the defendants will be allowed to defeat the action on the bail-bond by means of a fraud. Such an application was granted by the Court of Common Pleas in *Austen v. Fenton* (b).

Cur. adv. vult.

(a) 4 B. & C. 864.

(b) 1 Tunn. 25.

1827.

WARRICK
against
OLDAKER.

The judgment of the Court was now delivered by
 BAYLEY J. (a) The question in this case was, Whether
 the record on the recognizance roll had been made up
 in a manner warranted by the practice of the Court?
 If there had not been any rule to bring in the body, the
 time for justifying bail would have expired on the 10th
 of February. But upon an examination of the authorities
 we think it clear that, by giving the body rule, the
 time for justifying bail was extended, and that the parties
 had until the 12th for that purpose, and having then
 done it, they were entitled to enter on the recognizance
 roll, *comperuit ad diem*, or to enter an appearance
 generally, which must be taken to be an appearance
 according to the exigency of the writ. In *Wright v.*
Walker (b) it was expressly decided that if bail are put in
 and justified, according to the rule upon the sheriff, the
 plaintiff cannot proceed upon the bail-bond. The affidavits
 filed in *Blachford v. Hawkins* (c) raised the same
 question, and by them the case was put upon the same
 footing, although, according to the report, it proceeded
 upon the ground that the plaintiff, by ruling the writ
 to bring in the body, had shewn an election to proceed
 against him, and could not afterwards take an assignment
 of the bail-bond. (d) The case of *Bond v. Evans* (e) was
 mainly relied on by the plaintiff. It is certainly stated
 in the marginal note, that bail must justify within four

(a) Lord Tenterden C. J. was not present during the argument.

(b) 5 B. & P. 364.

(c) 1 Bing. 181.

(d) It was, at one time, the practice in K. B., that if the sheriff ruled
 the sheriff to bring in the body, he could not afterwards take an assignment
 of the bail-bond; he was considered as having made his election to
 proceed against the sheriff. *Jasp. Pr. edit. 1788, p. 127.* The 2d
 edit. 154.

(e) 4 B. & C. 364.

days after execution, although the body rule has not
~~any~~ *any* point was decided, nor did the affidavits raise
the question, for they did not state that the sheriff had
been ruled to bring in the body. Upon these authorities
we are of opinion that the plea in this case was esta-
blished by the record produced, and that the record
was rightly made up. And it is very important to
country bail that this should be the rule of practice; for
the ordinary course is, that the party rules the sheriff,
and he gives notice to the bail, and it would lead to
great inconvenience if proceedings could be taken
against them before that rule expires.

Rule discharged.

1827.

*Whitney
against
Oldham.*

ELIZABETH HOWES against BALL.

*Wednesday,
November 21st.*

TROVER for a stage coach. Plea, not guilty. At
the trial before Lord Tenterden C. J., at the London
Chancery after Hilary term 1827, it appeared, that in the
month of April 1826, the plaintiff's husband (since de-
ceased) bought the coach in question of the defendant,
and the following agreement was signed by them both:
" I, John Howes, do hereby agree to give Thomas Ball
the sum of 100*l*. for a new stage-coach; in payment of
which, to give Thomas Ball four bills of 25*l*. each; and,

*A. agreed to
give B., a
coachmaker,
100*l*. for a
coach, and to
pay for the
same by four
bills of 25*l*.
each; and fur-
ther, that B.
should have a
claim upon the
coach until the
debt was duly
paid. The bills
were given,
but the first*

*was not paid when it became due. A. died; his administratrix sent the coach to B. to have
the wheels repaired; B. detained it, on the ground that the bills had not been paid: Held,
in an action of trover brought by the administratrix, that the agreement operated as a mere
license from A. to B. to take the coach if the bills were not paid; that it was not transfer-
rible, and that the coach, having vested in the administratrix by operation of law, the de-
fendant was not justified in detaining it.*

1887.

Howie
vs.
Ball.

further, I *John Howie* do agree that *Thomas Ball* do have and hold a claim upon the coach, until the debt be duly paid." The four bills were given at different dates, the first of which became due in the month of October 1826, and was dishonoured. *John Howie* was then dead; but the plaintiff had taken out administration to him, and continued to carry on the business of a stage-coach keeper. In November 1826, some of the wheels belonging to the coach being in want of repair, were left at *Ball's* shop, and on the 10th of November those repairs being completed, the plaintiff's servant drove the coach to the shop door in order to have those wheels put on. The defendant desired him to drive into the yard, and take his horses from the coach, saying it required some other repairs, which was not true. The servant accordingly drove into the yard, and took off his horses, and then the defendant said, that he meant to keep the coach until the four bills, of which one only was then due, were paid, and he chained the wheels together in order to prevent him from taking the coach away. The Lord Chief Justice thought that the defendant was not justified in thus taking possession of the coach, and directed a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit. A rule nisi for that purpose was granted in *Easter* term; against which.

The *Attorney-General* and *R. V. Richards* on a former day in this term shewed cause. There are two questions; first, as to the meaning of the agreement; secondly, whether the defendant could resume possession of the coach by a trick, even if the agreement gave him any right at all to the possession? The coach was paid for by bills, and as a lien is inconsistent with credit, as soon

1807.

HAYES
against
BATE.

as the bills were given, the defendant would have been bound to give up possession of the coach, unless that were provided for by some special agreement. If the agreement gave him a right to keep the coach until the bills were paid, he was then in the same situation as a person who has contracted to sell an article for ready money; and in either case, if possession is parted with, the lien is at an end. The agreement is, moreover, quite uncertain; it does not specify whether the defendant is to retain the coach until the bill overdue is paid, and so to resume possession from time to time if the others are dishonoured; or, whether, having once obtained it, he is to keep possession until all are paid. Secondly, the defendant had no right to obtain possession of the coach by means of a fraudulent representation made to the plaintiff's servant, *Madden v. Kempter (a)*.

Gurney and Chitty contra. It is impossible to suppose that the parties intended to make an agreement that *Bate* should never part with the possession of the coach until all the bills had been paid, for then there could have been no motive for giving bills at all. They must have intended that he should part with the coach, but have a right to resume possession in the event of any one of the bills being dishonoured, and retaining it until that should be paid. This is a reasonable construction of the agreement, and the Court will be disposed to put any reasonable construction upon that instrument rather than that it shall be altogether unavailing. Then as to the mode of obtaining possession, it was held in *Whitehead*.

(a) 1 Compb 12.

1827.

1827.

Howes

v. Ball

1827.

1827.

v. Vaughan (a), that the lien of a policy broker revived upon his regaining possession of a policy, although that was effected by means of a trick.

Cur. adm. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows:—

Taking into consideration the agreement, the fact of the delivery of the bills by *Howes* to *Ball*, and of the delivery of the coach by *Ball* to *Howes* at the same time, we think the transaction amounted to a sale of the coach, so as to transfer the property in it from *Ball* to *Howes*. That being so, the question is, Whether, after such a transfer of the property, the seller can have any valid claim on the property so transferred? Hypothecation is not allowed by the law of *England*, although in some parts of the Continent, not many years ago, it was allowed. The utmost effect, therefore, that can be given to this instrument is, to construe it as a licence given by *Howes* to *Ball* to resume possession of and retain the coach, in case *Howes*

did not pay the bills. Construing it as a licence, it is a personal licence, not available against any person to whom *Howes* might transfer the property. It could not, therefore, be available against his administrator, to whom the property came by operation of law. If *Howes* had lived, and the coach, on non-payment of the bills, had been taken out of his possession, and he had brought an action, the defendant might, in bar of that, have relied on the instrument. But as the licence was a mere personal licence, it was not available against his administrator. In this case, the defendant obtained by him, suspended the proceedings until licence,

receivers, and to the fact that the property had been transferred by the act of the party or by operation of law, we are of opinion that the defendant was not entitled to take and detain the coach. The rule for entering a nonsuit must, therefore, be discharged.

Rule discharged.

BURGESS against SWAYNE.

Friday,
Nov. 23d.

THIS was a case of bailable process, returnable the 7th of March 1827. On the 2d of May the defendant obtained a Judge's order for particulars of the plaintiff's demand, and for a stay of proceedings until the particulars were delivered. No particulars having been delivered, the defendant, on the 8th of November, signed judgment of non pros for want of a declaration. A rule nisi having been obtained for setting aside that judgment for irregularity,

The defendant, having obtained a judge's order, for delivery of particulars of plaintiff's demand, and for staying proceedings until they were delivered, cannot sign judgment of non pros against the plaintiff for not declaring.

Archbold shewed cause, and contended, that a defendant ought to be permitted to sign judgment after such a lapse of time, for otherwise it would be in the power of a plaintiff to suspend the case ad infinitum.

Lord TENTERDEN C. J. The defendant might have obtained a Judge's order for the delivery of particulars within a given time; and then, if the particulars were not delivered within the time specified, he might have signed judgment. In this case, the defendant, by the order obtained by him, suspended the proceedings until

See note further on 2
8 Aug 185

1827.

*Bussness
against
SWAYNE.*

the particulars were delivered, and then, before any such particulars had been delivered, he signed judgment of non pros against the plaintiff for not proceeding.

Rule absolute.

*Friday,
November 23d.*

REEVES *against* SLATER.

Where *A. B.* executed a warrant of attorney in the name of *C. B.*, and judgment was entered up, and a *fi. fa.* issued against him by that name: Held, that this was right, and that the sheriff was bound to execute it.

CASE against the defendant, late sheriff of *Sussex*, for a false return to a writ of *fi. fa.* The declaration stated that in *Easter* term, 6 G. 4., plaintiff obtained a judgment in K. B. against *John Stone Lundie* for a debt of 200*l.*, and 3*l.* 5*s.* damages and costs; that on the 16th of *May*, 6 G. 4., plaintiff issued a *fi. fa.*, directed to the then sheriff of *Sussex*, directing him to levy the said debt and damages on the goods of *John Stone Lundie*; that the writ was indorsed to levy 178*l.* 17*s.*, and delivered to defendant, then sheriff of *Sussex*, who, by virtue of it, seized divers goods of *John Stone Lundie*, which he ought to have sold under the writ, but neglected to do so, and falsely returned *nulla bona*. Plea, the general issue, not guilty. At the trial before *Little-
dale* J., at the *Sussex* Lent assizes, 1827, it appeared that the judgment mentioned in the declaration was entered up on a warrant of attorney, filled up in the name of *John Stone Lundie*, and signed *J. S. Lundie*. A writ of *fi. fa.* was issued as alleged, commanding the sheriff to levy on the goods of *John Stone Lundie*, upon which a warrant was made out, and delivered to an officer, who, by virtue of it, seized goods and chattels to the value of the sum indorsed upon the writ, the property of the person who executed the warrant of attorney, but whose right name was proved

proved to be *John Stowe Lundie*. After the seizure was made, the officer received notice that the goods were not the property of *Lundie*, but had, before his marriage, been conveyed to trustees for his wife. The sheriff, after some inquiry, believing this to be the fact, asked the plaintiff to indemnify him, who refused to do so, and thereupon the sheriff directed the officer to relinquish possession, and being afterwards ruled to return the writ, he returned nulla bona. The conveyance to trustees appeared not to be a bona fide transaction, and the defendant was compelled to rely on the fact that the party whose goods were seized by the officer was not *John Stone Lundie*, that there was no such person, and, therefore, the return of the sheriff that *John Stone Lundie* had no goods in his bailiwick was true. To this it was answered, that as *John Stowe Lundie* had executed the warrant of attorney in the name of *J. S. Lundie*, that must be taken to mean *John Stone Lundie*, the name inserted in the body of the instrument, and that he was estopped from afterwards disputing that he was so called; the sheriff was, therefore, bound to sell his goods when seized under the writ. The learned Judge was of that opinion, and directed a verdict for the plaintiff, but he gave the defendant leave to move to enter a nonsuit. A rule nisi for that purpose was granted in last Easter term, and *Morgan v. Brydges* (a), *Cole v. Hindson* (b), *Shadgett v. Clipson* (c) were cited.

Marryat, Gurney, and Comyn now shewed cause. This case is very distinguishable from those which were

(a) 3 Stark. N. P. C. 514. 1 B. & A. 647.

(b) 6 T. R. 234.

(c) 8 East, 328.

1827.

HEAVEN
LIGHT
STAIRS

is fully affirmed by the deed of John Stone-Landale, and that he had good title to the sheriff ought to have seized and sold on. It is true, that John Stone-Landale was a person interested in the slavery and the question (ing) whether the sheriff was bound to take notice of that, and save his goods. The case of Morgan v. Brydges is directly in point, for in the defendant's case, the sheriff would have been justified in detaining the party whom he arrested by a wrong name; but the Court held that he was not bound so to do. So here, the party might indeed be estopped from saying that his name was not John Stone-Landale; and yet the sheriff might not be bound to take upon himself the risk and responsibility of executing such a writ, and this difference was relied upon by Lord Ellenborough in the case cited. It has been attempted to distinguish that case from the present, because the Court there said that the plaintiff himself was in fault. The same observation applies here; the plaintiff should have taken care that the warrant of distress was filled up with the proper name of the debtor, and then no difficulty could have arisen. In *Cole v. Jackson* it was said, that the mesnour would set aside unless the party appeared and omitted pleading in abatement: here, he had no opportunity of doing so.

There is a very plain distinction between means and final process, and I think it is decisive of the present question. The facts of the case are very strong against the sheriff. He took possession under this writ, of goods now admitted to have been the goods of the party, kept them for eighteen days, and then refused to sell on account of his having received

1827;

 REEVES
 against
 SLATER.

ceived a notice that they belonged to a third person. Nothing was at that time said about any error in the process. If the sheriff had entertained any doubt upon that point, he should have caused the judgment to be examined, and he would have found that it corresponded with the writ, and that the party was estopped from disputing the accuracy of his description. The party himself having suffered judgment to be entered up against him by the name of *John Stone Lundie*, it was not for the sheriff to render that nugatory by refusing to execute the fieri facias, and he must be liable for the consequences of having done so.

BAYLEY J. I have no doubt in this case. It is clear that the party could not have taken the objection now set up, but it is said that the sheriff may. There is, however, no reason why he should be allowed to do so when the party is clearly estopped by the judgment, and the sheriff incurs no more responsibility than in any other case; viz. the necessity of proving that the party whose goods are seized was the party in the suit in which the writ issued.

Rule discharged.

1827.

LAWSON and Another against TAYLOR.

Saturday,
November 24th.

DEBT on bond, dated the 25th of *March* 1817, for 800*l*. The defendant craved oyer of the bond and condition. The condition, which recited that *T. Hutton* had been duly elected overseer of the poor of the township of *Lynn*, in the county of *Chester*, in which situation he would have occasion to receive various sums of money, was, that if *Hutton* should, at all times during his continuance in his office of overseer of the poor of the township of *Lynn*, well and faithfully execute and perform the same, according to the directions of the several acts of parliament made for the regulation of overseers of the poor, and should truly account for, distribute, pay, and apply all such sums of money, not exceeding the sum of 400*l*., as should come into his hands by virtue of his said office, then the obligation to be void, otherwise to be in full force. Pleas, first, non est factum. Second, that the office was an annual office, which *Hutton* held for the space of a whole year, which had long since expired; that the bond was given to secure the faithful performance of said office of overseer during the said year, that is to say, from the 25th *March* 1817 to the 25th *March* 1818 only, and to secure the good and true accounting for, distributing, paying, and applying by *Hutton* of all such sums of money (not exceeding 400*l*.) as should arise or come into his hands by virtue of his said office, during the said last-mentioned year only; and that he did, in fact, during one whole year, from said 25th *March* 1817 to the said 25th *March*

1818,

An overseer has not, by virtue of his office, any authority to borrow money; and, in an action against a surety on a bond conditioned for the overseer's faithfully accounting for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer, and applied by him to parochial purposes.

1827.

LEIGH
against
TAYLOR.

1818, duly and faithfully perform the said office of overseer of the poor; and that he did likewise, during the whole of the said year, well and truly account for, distribute, and pay and apply all such sums of money, not exceeding 400*l.*, as did arise or come into his hands by virtue of his said office. Wherefore, &c. Replication, taking issue upon first plea; and as to the last plea, that during the said year, from 25th March 1817 to said 25th March 1818; and whilst *Hutton* was overseer, he received and had in his hands, by virtue of his said office, 89*l.* 10*s.*, which he had (although requested to do) wholly neglected and refused to account for, distribute, &c., and the same is still wholly undistributed, &c. Wherefore, &c. Rejoinder, that *Hutton* did well and truly account for, distribute, pay, &c. all sums of money, not exceeding, &c. as came into his hands during the said year by virtue of his office. At the trial before *Warren C. J.*, of *Chester*, at the Spring assizes 1817, for that county, it appeared, that the plaintiffs were entitled to recover a sum of 56*l.*, provided all the sums which the plaintiffs sought to charge the defendant with could be considered to have been received by *Hutton* by virtue of his office of overseer. One of these sums was 100*l.*, borrowed of one *For* by *Hutton* and his co-overseer, and applied by them to parochial purposes. It was objected, by the defendant's counsel, that that sum could not be recovered by the plaintiffs, inasmuch as it could not be said to have been received by *Hutton* by virtue of his office of overseer; an overseer, as such, having no authority to borrow money: *Mundy v. Knowles* (a). The learned Judge directed the jury to

(a) 2 Stark. 65.

1827.

LEIGH
against
TAYLOR.

find a verdict for the plaintiff for 38*l.*, with liberty to the defendant to move to enter a nonsuit; if the Court should be of opinion that the defendant ought not to be charged with the sum of 100*l.*. A rule nisi having been obtained in last Easter term for that purpose,

Mrs. Serjt. and Cottingham now shewed cause, and contended, that a sum of money borrowed and received by an overseer for and applied by him to the purposes of the township, must be considered as money received by him by virtue of his office of overseer. The township would be charged with the amount by the lender, who would treat *Hutton* as the agent of the township, and evidence to that effect would arise from the circumstances of the application of the money to the use of the township.

Ors Serjt. and J. Williams contra. It is the duty of the overseer, when he requires money for parochial purposes, to cause the same to be levied by rate, and the money raised by the rate and paid into his hands is properly money received by him by virtue of his office of overseer; but he has no authority as overseer to borrow money, and the township could not be compelled to pay the money so borrowed by him, and money coming into his hands by way of loan cannot be considered as money received by him by virtue of his office of overseer.

Lord Tenterden C.J. The condition of the bond was, "that if *Hutton* should truly account for all such sums of money, not exceeding 400*l.*, as should arise or come into his hands by virtue of his office of overseer;"

and

1827.

Loan
against
TAXES.

and the question is, Whether he can be considered as having received by virtue of his office of overseer this sum of 100*l.* which was advanced to him upon loan by *Act*. The borrowing of money is no part of the duty of overseer. If, indeed, it had been borrowed by the direction of the parishioners, there might have been grounds for saying that it came into his hands in his character of overseer; but that does not appear to have been the case. This, therefore, must be considered to have been a loan to *Hutton* and his co-overseer individually, and not in their character of overseers; and if it was not money received by *Hutton* by virtue of his office, it is not within the condition of the bond. The rule for entering a nonsuit must therefore be made absolute.

Rule absolute.

Monday,
November 26th.

DRIVER against HOOD.

Where an award directed that one of the two parties to the submission should pay the expenses of the reference, and that the other should repay them on demand; and the former having paid them, made an affidavit of debt against the other party, alleging such payment, but not stating any demand of repayment; Held, that this was not sufficient.

THE defendant in this case was holden to bail by virtue of a Judge's order obtained upon an affidavit stating that *Hood* had commenced an action against *Driver*, which was referred to an arbitrator by a Judge's order, afterwards made a rule of Court. The costs of the cause were to abide the event, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that *Hood* had no cause of action, and that *Driver* should, in the first instance, pay 1*l.* 1*s.* the costs of the reference, and that *Hood*

should

should repay that sum *upon demand*. The affidavit then stated that *Driver* paid that sum, and that the costs of his defence had been taxed at 7*l.* 7*s.* 6*d.*, which, together with the 17*l.* 17*s.*, amounted to 25*l.* 4*s.* 6*d.*, "and deponent further saith, that *Flood* is now justly and truly indebted to him, *Driver*, in the sum of 25*l.* under and by virtue of the said order, rule, and award." A rule nisi having been obtained to have the bail-bond delivered up to be cancelled,

1827.

 DAWSON
 against
 FLOOD.

Chitty shewed cause, and contended, that the defendant, having been arrested upon a Judge's order, was in a different situation from persons arrested in the ordinary manner, upon an affidavit of debt. Although the affidavit does not allege a demand of the 17*l.* 17*s.*, yet if upon the whole it appeared that the plaintiff had a claim to that amount, the affidavit is sufficient, *Imlay v. Ellessen* (a). This resembles the case of a bill of exchange payable on demand, in which case it is not necessary to allege a demand.

Comyn, contra, contended, that this was an ordinary arrest as for a debt, and very different from an arrest by special order of a Judge where no debt exists. That it was also different from the case put as to a bill of exchange, for here there would be no cause of action for the 17*l.* 17*s.* until after demand made.

LORD TENTERDEN C. J. We think this affidavit insufficient. It was incumbent on the plaintiff to shew the existence of a debt, and that does not sufficiently appear. The bail-bond must be delivered up to be cancelled.

Rule absolute.

(a) 2 East, 453.

1827.

Tuesday,
November 27th.

The KING against HEADLEY and Others.

By charter of the 10 Jac. 1., reciting that the borough of D. was an ancient borough, and that the mayor and burgeses, time out of mind, had enjoyed divers franchises, the king confirmed to the mayor and burgeses all privileges, &c., and granted to the mayor, burgeses, and their successors, that the mayor and town clerk, together with thirty-six burgeses, being the common council, or the greater part of them, should nominate one of the number of twelve chief burgeses *counsellors* to be mayor; and it further granted to the mayor, town clerk, and thirty-six chief burgeses, the power to elect all officers, and also of taking all *free burgeses* into the borough. It then granted to the mayor and chief burgeses, being *counsellors*, and the common council, a power of imposing fines; and that the mayor and burgeses, and their successors, should hold within the borough a court of record before the mayor, town clerk, and chief burgeses, being *counsellors*, and that all manner of pleas should be determined before the mayor, town clerk, and chief burgeses, being *counsellors*; and that the mayor, town clerk, and one of the chief burgeses *counsellors* (to be chosen by the mayor, town clerk, and common council) should be justices of the peace within the borough. By a subsequent charter, reciting the former, King Charles the First confirmed the same, and granted, *inter alia*, that the mayor and the recorder, and the chief burgeses, being the common council for the time being (of which chief burgeses some were known by the name of *chief burgeses counsellors*), should have the power to elect one of the aforesaid chief burgeses and *counsellors* to be mayor, and that the mayor and recorder, and chief burgeses of the common council of the borough, should have the power to elect all officers, and also of taking thereafter all free burgeses into the number of free burgeses: Held, that by these charters (there being no evidence of usage prior to the granting of the charter of Jac. 1.), the twelve burgeses counsellors did not form an integral part of this corporation for the purpose of electing free burgeses, and that the right of electing free burgeses was in the mayor, recorder, and the thirty-six chief burgeses, or the major part of them, and, consequently, that to make a good election of a free burgess it was sufficient if there were present the mayor, recorder, and a majority of the thirty-six chief burgeses.

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burgesses councillors, or aldermen, and ten chief burgesses were present, when *Headley* and the other defendants named in the rule were respectively elected and sworn chief burgesses of the said borough on the 8th day of *October* 1825.

The affidavit in support of the rule, after stating that the borough of *Devizes* was a corporation by prescription, with twelve chief burgesses councillors (or aldermen), and twenty-four chief burgesses, set out a charter of *King James the First*, bearing date the 10th of *July* in the third year of his reign, by which, after reciting that the borough of *Devizes* was an ancient and ~~existing~~ borough, and that the mayor and burgesses of the borough had time out of mind used and enjoyed divers liberties, franchises, &c. as well by the charters of his predecessors, kings of *England*, to them and their predecessors theretofore granted, and also by means of divers prescriptions and customs anciently used in the borough, and that the then mayor and burgesses had humbly besought his said majesty to extend to them his high assistance; and that his majesty, for the better rule and government of the borough, was willing to direct the time and manner of choosing the mayor of the borough; and did vouchsafe to explain and confirm other grants, liberties, and franchises, as well as the charters of his predecessors to the said mayor and burgesses and their predecessors theretofore made and granted; as also by means of divers prescriptions and customs theretofore anciently used, and to grant other liberties and ordinances profitable for the good rule of the borough; his majesty, yielding to their request, did, inter alia, confirm to the mayor and bur-

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gesses of the borough and their successors for ever all and singular gifts, grants, &c. by any of his predecessors to the mayor and burgesses of the borough aforesaid theretofore granted and confirmed, or by reason of any lawful custom, use, or prescription theretofore had and enjoyed; and further, to avoid from thenceforth all such doubts which theretofore had arisen concerning the election of the mayor of the borough, his majesty did give and grant to the aforesaid mayor and burgesses and their successors, "that the mayor and common clerk, called the town clerk, together with thirty and six burgesses, being the common council of the same borough for the time being, or the greater part of them, from time to time, and at all times thereafter, should have power yearly and every year on, &c. of choosing, nominating, and assigning, and that they should and might choose, nominate, and assign, one honest and discreet man of the number of twelve chief burgesses *counsellors* of the borough aforesaid, who should be mayor for one whole year next ensuing, who, before he should be admitted to exercise the same office, that is to say, on, &c., should take his corporal oath well and truly to execute the same office before his last predecessor, being next before mayor of the borough and the town clerk of the borough, in the presence of the aforesaid thirty and six burgesses, and other burgesses of the same borough for the time being, or the greater part of them; and that after such oath so taken, he should execute the office of mayor for one whole year next following; and that the *mayor and town clerk for the time being, and thirty-six chief burgesses for the time being, or the greater part of them, from thenceforth should have the nomination and*
election,

election, and that they should and might nominate and
 elect from thenceforth and for ever all and such officers
 and ministers whatsoever thereafter to serve within the
 same borough as theretofore had had and enjoyed any
 offices within the same borough; and also of taking there-
 after all and singular free burgesses of the borough into the
 number of free burgesses of the same borough. And that
 if any burgess or inhabitant of the borough should be
 thereafter elected into the office of mayor of the borough,
 or into the number of the chief burgesses or counsellors
 of the borough, or into the number of the free burgesses
 of the borough, or to any other office within the borough,
 such person so chosen being apt and fit, and after the
 election should be made known to him, should refuse,
 without reasonable cause, to take upon him the office to
 which he should be elected, that then it should be lawful
 for the mayor and chief burgesses aforesaid, being
 counsellors, and the common council of the borough for
 the time being, or the greater part of them, to set a
 reasonable fine upon him so refusing." By another
 clause of the charter it was granted that the mayor for
 the time being, and the town clerk and chief burgesses
 for the time being, or the greater part of them, should
 have power to make statutes and resonable orders, for
 the good rule and government of the burgesses, arti-
 ficers, and inhabitants of the borough; and that the
 mayor and town clerk, and chief burgesses, being coun-
 sellors, and the common council of the same borough,
 and the greater part of them as aforesaid, as often as
 they should make such laws, statutes, and ordinances,
 such and such like reasonable pains, penalties, and pu-
 nishments, might impose and assess by imprisonment of
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their bodies, or by fines or amerciaments, or by any of them, against and upon all offenders contrary to such laws, as to the same mayor, town clerk, and chief burgesses for the time being, or the greater part of them as aforesaid, should seem reasonable and meet. And his majesty further granted to the mayor and burgesses of the borough, and their successors, that they from thenotforth and for ever thereafter should hold within the borough, in the guildhall of the borough, a court of record to be held and adjourned before the mayor, town clerk, and chief burgesses, *being counsellors* of the borough for the time being, to be held before twelve, eleven, ten, nine, eight, seven, six, five, or four of them, whereof the mayor of the borough for the time being, and the town clerk of the borough for the time being, his majesty willed to be two, and that in that court they might hold by plaint, to be levied in the same court, all manner of pleas, actions, &c., so as such pleas, &c. should be determined before the mayor, town clerk, and chief burgesses, *being counsellors* of the borough for the time being, or before twelve, eleven, ten, nine, eight, seven, six, five, or four of them, whereof the mayor and town clerk of the borough for the time being his majesty willed to be two. The charter then granted that the mayor and town clerk of the borough, and also one of the *chief burgesses and counsellors* of the borough, from time to time to be chosen by the mayor, town clerk, and common council of the borough for the time being, and the greater part of them, whereof the mayor and town clerk his majesty willed to be two, during the time wherein they should happen to be in their offices, should be his justices, and every of them was and should be

justice

justice of his majesty, his heirs and successors, to keep the peace.

The affidavits then set out another charter of *Charles the First*, bearing date the 5th of *June*, in the fifteenth year of his reign, which, after reciting the former charter of *Ac. 1.*, ratified and confirmed the same, appointed a recorder in lieu of the town clerk, and, among other things, granted that the mayor of the borough for the time being, and the recorder of the borough for the time being (and in the absence of the recorder his deputy), and the chief burgesses, being the common council of the same borough for the time being, (of which chief burgesses some were called, known, or distinguished by the name or distinction of chief burgesses counsellors of the borough aforesaid,) or the greater part of them, at all times thereafter should have power and authority, yearly and every year, on, &c., to assemble in the guildhall of the borough, and then should choose one honest man of the aforesaid chief burgesses and counsellors of the borough aforesaid to be mayor of the borough for one whole year next following the eve of the feast of *St. Michael* after such election. And that the mayor and recorder of the borough for the time being (and in his absence his deputy), and the aforesaid chief burgesses of the common council of the same borough for the time being, or the greater part of them, from thenceforth should have the nomination, election, and appointing, and that they should nominate, appoint, and choose, from thenceforth, all officers and ministers whatsoever (other than the town clerk) to serve thereafter within the borough; and also all and singular free burgesses of the borough aforesaid, thereafter take into the number of free burgesses

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of the same borough. The charter gave to the mayor, recorder, and chief burgesses the power of imposing fines upon any person refusing to serve an office, and to make bye-laws, and assess and impose fines for breach of the bye-laws, in like manner as in the recited charter of *Jewes* the First was for that purpose contained. The affidavit then stated that these two charters had been accepted by the mayor and burgesses of the borough, and acted upon by them; that an election of free burgesses was had on the 1st of *August* 1825; that there were not present more than the mayor, recorder, seven capital burgesses, counsellors, or aldermen, and nine capital burgesses, when the defendants were elected and sworn capital burgesses; and that on the 8th of *October* 1825 there were present not more than the mayor, recorder, nine capital burgesses, counsellors, or aldermen, and ten capital burgesses, when the defendants were again elected and sworn capital burgesses, and that they severally exercised the office of a capital burgess; and that they respectively ought not to exercise the office of a capital burgess, inasmuch as they were not any of them duly elected and sworn capital burgesses of the borough.

The Attorney-General, Taitton, and Maresfield Esq. now shewed cause. It must be conceded that the first election was void, because a majority of the thirty-six burgesses was not present. But the defendants never acted under that election, and they are willing to disclaim as to the period which elapsed between the first and second election. Then as to the principal question, it cannot be disputed that if the twelve burgesses, counsellors constituted a distinct body, and formed an in-

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egral part of the common council, a majority of that body, and also of the remaining twenty-four capital burgesses, ought to have been present at the election. But in this case the twelve burgesses counsellors (who are called aldermen in the rule and the affidavits filed in support of it), quoad the right of election, are not a body distinct from the other capital burgesses. The clause of the charter which gives the right of election always mentions the thirty-six capital burgesses as constituting one body, (denominated the common council. The twelve burgesses counsellors have no corporate functions distinct from those to be performed by the other twenty-four capital burgesses. The only difference between the twelve and twenty-four is that the former are called burgesses counsellors, and the mayor is to be taken out of their body. One counsellor is to act as a justice; but that is not a corporate function, *Jones v. Williams* (a), *The Queen v. Langley* (b). By the charter of James the First, the mayor, town clerk, and chief burgesses are to make bye-laws; but fines for breach of the bye-laws are to be imposed by the mayor, town clerk, chief burgesses, being counsellors, and the common council of the borough. So that when it was intended to give to the twelve any power distinct from that given to the other chief burgesses, they are mentioned by name. But in the clause giving the right of election, the thirty-six are treated, not as two bodies composed of twelve and twenty-four, but as one entire body. This case, therefore, differs from all those where it has been held necessary that there should be a majority of each integral body present at the election of a mayor, because in those cases the clause of the char-

(a) 5 B. & C. 762.

(b) 2 *Id.* Raym. 1029.

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ters giving the right of election, contained a distinct recapitulation by name of the different component parts of which the common council or elective body was to consist, and required every one of those component parts to be present at the election. In *Rex v. Bellringer* (a) the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, were to elect the mayor. In *Rex v. Miller* (b) the election was to be by the mayor, his brethren, and the company of forty-eight. The company of forty-eight were a distinct integral part, and of that part only three were present at the election. In *Rex v. Bower* (c) the charter directed that there should be divers men who should be aldermen, two bailiffs, and twenty-four other men who should be chief and principal burgesses. The mayor and aldermen, or the greater part of them, were to choose four of the burgesses, and the mayor, aldermen, bailiffs, principal burgesses, or the greater part of them so constituted, were to choose one to be mayor. So that in the clause giving the right of election there was a distinct enumeration of all the component parts of the common council. There could be no doubt that each of those component parts formed a distinct integral part of the corporation.

Campbell, Erskine, and Parke, contra. There are in this corporation two distinct bodies, the twelve burgesses counsellors, and the twenty-four chief burgesses. The functions of the twelve burgesses counsellors are the

(a) 4 T. R. 810.

(b) 6 T. R. 268.

(c) 1 B. & C. 492.

functions

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functions of aldermen; for they are the persons from whom the mayor and the justices are to be elected. They, together with the mayor and town clerk, form the court of record for the recovery of debts within the borough, as well as the court of quarter sessions. The charter of *Jac. 1.*, which recites that the borough is an ancient borough, and that the mayor and burgesses possessed many liberties and franchises by prescription, refers to the thirty-six chief burgesses as a body already existing; twelve of that body being then called chief burgesses counsellors, and twenty-four chief burgesses only. And by the clause giving the right of election, the mayor, town clerk, and thirty-six burgesses are to choose one of the twelve chief burgesses counsellors to be mayor. This shows that at that time there were thirty-six common councilmen, twelve of them being called chief burgesses counsellors, and the residue only chief burgesses: they are recognised as two distinct bodies, each of them forming an integral part of the corporation. Then the charter of King *Charles the First* provides, that the mayor and the recorder for the time being, and in his absence his deputy, and the chief burgesses, being the common council of the borough for the time being, (of which chief burgesses, some were distinguished by the name of chief burgesses counsellors of the borough,) should choose one of the said chief burgesses counsellors of the borough to be mayor. Now, that is exactly the same thing, as if the power to elect had been given to the mayor and the twelve chief burgesses counsellors, and the chief burgesses, and if that had been so, then the cases of *Rex v. Miller (a)*,

(a) 6 T. R. 268.

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Res. v. Bower (a), *Res. v. Devonshire* (b), are decisive, that in order to make a good election, there must be present a majority of the twelve and a majority of the twenty-four. The charter says, that the common council shall consist of the mayor and the recorder, and the chief burgesses, the twelve and the twenty-four, and that the right of election shall be in the common council, or the greater part; or, in other words, it says, that the right of election is to be in the thirty-six chief burgesses, but that the body of thirty-six are constituted of the twelve and twenty-four. [*Holroyd J.* If the charter had said, that the twelve and twenty-four, or the greater part of them, were to elect, then the construction would be, that, to make a good election, there must be present the greater part of the twelve and the greater part of the twenty-four; but it only says that the thirty-six or the greater part of them shall elect; that must mean the greater part of the thirty-six.] But the charter afterwards goes on to shew how the thirty-six are constituted, viz. of the twelve and twenty-four. It is the same in effect as if it had said the twelve burgesses councillors and the twenty-four chief burgesses, making thirty-six, or the major part of them. Now it is clear that the free burgesses are to be elected in the same manner as the mayor; for the charter provides, that the mayor and recorder, and in his absence his deputy, and the chief burgesses of the common council for the time being, or the greater part of them, should nominate and choose all and all manner of officers, &c. to serve in the borough, and also all and singular free burgesses of the borough.

(a) 1 B. & C. 492.

(b) 1 B. & C. 609.

BAYLEY J. (a) If the facts disclosed in the affidavits raised any reasonable doubt in our minds, we would make the rule absolute; but if, on carefully considering those facts, no doubt whatever is produced in our minds, we ought not to make the rule absolute; for that of necessity will have the effect of occasioning great expense to all the parties. The affidavits are silent on the subject of usage, and the counsel in support of the rule have relied entirely on the construction of the charters. The general rule is, that when a charter gives a right of election to persons, describing them by their corporate character, as mayor, aldermen, and capital burgesses, every member who comes within that description must concur in, or at least be present at the election; and there must be a majority of each definite body, as, for instance, if the right of election be in the mayor, aldermen, and capital burgesses, there must be a majority of the aldermen and a majority of the capital burgesses. But the necessity of the concurrence of a majority of each integral part depends entirely on the language by which the right of election is granted. The case of *Rex v. Hoyte* (b) shews that a charter may be worded so as not to require the concurrence of a majority. In *Rex v. Miller* (c), *Rex v. Bellringer* (d), and *Rex v. Bower* (e), the right of election was given specifically to the different component parts of the corporate body. In this case there is no evidence of any usage

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(a) Lord Tenterden C. J. during the argument was sitting at Nisi Prius at Guildhall.

(b) 6 T. R. 430.

(c) 6 T. R. 268.

(d) 4 T. R. 810.

(e) 1 B. & C. 492.

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before the time when the charter was granted; and although the corporation may be a corporation by prescription, and although it may be collected from the charter granted by King James the First, that before that time there had been thirty-six persons, capital burgesses, of whom twelve were counsellors, yet it does not thereby appear for what period of time they had existed, or what their respective rights were. Now the language of this charter will shew, whether it was intended there should be a concurrence of a majority of the twelve burgesses counsellors, and a majority of the twenty-four chief burgesses. If that were intended, the language used in the charter should have been, that the election should be by the mayor, the town clerk, the twelve burgesses counsellors, and the twenty-four capital burgesses. That is the language used in the charter, when it gives the power to impose fines. But the language of the clause of the charter giving the right of electing the mayor is, "that the mayor and common clerk, called the town clerk of the borough, together with *thirty and six burgesses* of the same borough, being the common council of the same borough for the time being, or the greater part of them, shall from time to time and at all times have power of electing the mayor." The right is therefore given to the thirty-six, as if there was at that time a known body consisting of that number; and no distinction is made between any of the component parts of that body. In all the cases where the presence of every integral part of a corporation has been held to be necessary, the different component parts of the corporation have been specifically mentioned. The charter then provides for the election of other officers,

officers, and says, "that the mayor and town clerk of the borough, and thirty-six chief burgesses of the same borough, or the greater part of them, from thenceforth for ever shall have the election of all officers." The right of electing officers is given, therefore, not to the twelve and twenty-four, but to the mayor and to the thirty-six, no distinction being made between the individuals of whom the thirty-six are composed. There are in this charter two clauses by which a power of imposing fines is granted, and the language of those clauses is very different from that used in the clauses giving the right of election. One of those clauses gives the mayor and chief burgesses, being counsellors, and the common council, or the major part of them, the power of imposing a reasonable fine upon any person refusing to take an office. The other gives the mayor, town clerk, and chief burgesses, *being counsellors*, and the common council, the power of imposing penalties upon all offenders against bye-laws. In these two clauses the twelve burgesses counsellors and the twenty-four chief burgesses are treated as two distinct bodies. It is essential, therefore, that a majority of each of these bodies should be present at any meeting where a fine is to be imposed. But in the clause giving the right of electing the mayor, officers, or free burgesses, the thirty-six chief burgesses are treated as one aggregate body, and therefore it is sufficient, that at any such election a majority of that body should be present. The language used in the charter of King Charles the Second requires a similar construction. It states, that there were at that time in the corporation a body of thirty-six; that the thirty-six consisted of twelve who were counsellors, and twenty-four who were not. That being the case, if it had been intended

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intended that at the elections of officers there should be a concurrence of the definite body of twelve, and of the definite body of twenty-four, the language which would obviously have been used would have been, that the right of election should be in the mayor and in the counsellors, and in the residue of the capital burgesses of the said borough. But the language actually used is, "that the mayor, the recorder, or in his absence the deputy, and the chief burgesses, being the common council of the same borough for the time being, of which chief burgesses some are called, or known, or distinguished by the name or distinction of chief burgesses, counsellors of the borough aforesaid, or the greater part of them, at all times hereafter, shall have power and authority to choose, nominate, and appoint one honest man of the aforesaid chief burgesses and counsellors of the borough aforesaid to be mayor;" and then it afterwards provides, "that the mayor and recorder for the time being (and in his absence his deputy), and the aforesaid chief burgesses of the common council of the borough for the time being, or the greater part of them, from henceforth shall have the power of nominating and appointing other officers." Here again the same language occurs, and no distinction is made between the twelve and twenty-four; but the right of election is given to the whole collective body of chief burgesses as a whole, and no distinction is made between the different classes of which that body consists. In the case of *The King v. Devonshire* (a), the point did not of necessity arise; but it did arise incidentally. In that case, upon the death of a capital burgess, the right of electing another was

to be elected by the mayor, recorder, and the greater part of the

(a) 1 B. & C. 609.

in the capital burgesses at that time surviving and remaining, or the greater part of the same. Of the capital burgesses four were aldermen. The charter required that two aldermen should be present at the election of all officers. There were not two aldermen present at the election of the defendant as a capital burgess. It was contended, that the presence of two aldermen was necessary, because capital burgesses came within the meaning of the word officers; but it was never suggested that the concurrence of three aldermen was necessary. For these reasons I am of opinion that the construction of this charter does not admit of any reasonable degree of doubt, so as to warrant us in making this rule absolute. As to the other point, the rule may be enlarged, as the parties have been again elected, in order to enable them formally to disclaim, in case any quo warranto information be filed against them.

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HOLROYD J. This is a very plain case. If there were any reasonable doubt, we should be bound to make the rule absolute. But there appears to me to be none whatever. The question, which is as to the power of electing the chief burgesses, turns entirely upon the construction of the charter, independent of any usage. By the charter of *Charles the First* the election of the chief burgesses is to be by "the mayor and recorder of the borough for the time being (and in his absence his deputy), and the aforesaid chief burgesses (they being thirty-six) of the common council of the same borough for the time being, or the greater part of them." It is insisted that the common council consists of two classes of persons, viz. of twelve burgesses counsellors, and the

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the remaining chief burgesses, and that a majority of each of these bodies ought to have concurred in the election. But it seems to me that the charter does not require a majority of each of these bodies, and that every word of the charter is satisfied by holding it to be sufficient that, besides the mayor and recorder, there should be present a majority of the thirty-six chief burgesses, because the power of election is given to them, or the major part of them. If the power of election had been given to the twelve burgesses counsellors and to the twenty-four remaining chief burgesses, then it would have been requisite that there should be a majority of each body. In the other clauses of the charter which give the power of imposing fines, the chief burgesses counsellors are mentioned by name. For these reasons I think that the rule must be discharged.

LITLEDAL J. I am of the same opinion. In most charters there is a distinct declaration that there shall be one mayor, a definite number of aldermen or capital burgesses, and some definite number of persons to compose the common council. In such cases the charter recognizes the existence of all these as separate and distinct bodies. But the charters in this case do not recognise the twelve burgesses counsellors as a body distinct from the chief burgesses. It seems from the recital in the charter of *James the First*, that this is a corporation by prescription. The charter does not point out specifically whether the twelve burgesses counsellors and the remaining chief burgesses are to be considered as separate existing bodies, or as composing one class, which is generally called the common council.

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It might have been shewn by affidavit what the usage of the borough had been prior to the granting of the charter of *James* the First, and if the practice had been to require at corporate meetings the attendance of a majority of the twelve chief burgesses counsellors, that would have been a recognition of the twelve as a distinct and separate body. But as there is no affidavit of any usage, we must form our opinion on the charters alone. There is a distinction between the charter of *James* the First and that of *Charles* the First. Each of them, with respect to the election of mayor, speaks of thirty and six chief burgesses being the common council of the borough. The words of the charter of *James* are, "that the mayor and town clerk, together with thirty and six burgesses of the borough, being the common council of the borough for the time being, or the greater part of them, shall have the power of choosing one honest and discreet man of the number of twelve chief burgesses counsellors of the borough, who shall be mayor." The language of the charter of *Charles* is, "that the mayor and the recorder (who is substituted for the town clerk), and in the absence of the recorder, his deputy, and the chief burgesses, being the common council of the borough for the time being (of which chief burgesses some are called or known by the name of chief burgesses counsellors of the borough aforesaid), or the greater part of them, shall have power to assemble and choose one honest and discreet man of the aforesaid chief burgesses and counsellors of the borough aforesaid, to be mayor." There might be some ambiguity, if the charter of *Charles* had stood alone, because it says, "of which chief burgesses some are known by the name of chief burgesses counsellors." The prior charter of *James*, however,

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the remaining chief burgesses, and that a majority of each of these bodies ought to have concurred in the election. But it seems to me that the charter does not require a majority of each of these bodies, and that every word of the charter is satisfied by holding it to be sufficient that, besides the mayor and recorder, there should be present a majority of the thirty-six chief burgesses, because the power of election is given to them, or the major part of them. If the power of election had been given to the twelve burgesses counsellors and to the twenty-four remaining chief burgesses, then it would have been requisite that there should be a majority of each body. In the other clauses of the charter which give the power of imposing fines, the chief burgesses counsellors are mentioned by name. For these reasons I think that the rule must be discharged.

LITLEDALE J. I am of the same opinion. In most charters there is a distinct declaration that there shall be one mayor, a definite number of aldermen or capital burgesses, and some definite number of persons to compose the common council. In such cases the charter recognizes the existence of all these as separate and distinct bodies. But the charters in this case do not recognise the twelve burgesses counsellors as a body distinct from the chief burgesses. It seems from the recital in the charter of *James the First*, that this is a corporation by prescription. The charter does not point out specifically whether the twelve burgesses counsellors and the remaining chief burgesses are to be considered as separate existing bodies, or as composing one class, which is generally called the common council.

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It might have been shewn by affidavit what the usage of the borough had been prior to the granting of the charter of *James* the First, and if the practice had been to require at corporate meetings the attendance of a majority of the twelve chief burgesses, counsellors, that would have been a recognition of the twelve as a distinct and separate body. But as there is no affidavit of any usage, we must form our opinion on the charters alone. There is a distinction between the charter of *James* the First and that of *Charles* the First. Each of them, with respect to the election of mayor, speaks of thirty and six chief burgesses being the common council of the borough. The words of the charter of *James* are, "that the mayor and town clerk, together with thirty and six burgesses of the borough, being the common council of the borough for the time being, or the greater part of them, shall have the power of choosing one honest and discreet man of the number of twelve chief burgesses counsellors of the borough, who shall be mayor." The language of the charter of *Charles* is, "that the mayor and the recorder (who is substituted for the town clerk), and in the absence of the recorder, his deputy, and the chief burgesses, being the common council of the borough for the time being (of which chief burgesses some are called or known by the name of chief burgesses counsellors of the borough aforesaid), or the greater part of them, shall have power to assemble and choose one honest and discreet man of the aforesaid chief burgesses and counsellors of the borough aforesaid, to be mayor." There might be some ambiguity, if the charter of *Charles* had stood alone, because it says, "of which chief burgesses some are known by the name of chief burgesses counsellors." The prior charter of *James*, however,

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sentment of twelve men; and the same learned author afterwards says, "Of some such like strength also (as I think) is the presentment of constables concerning sundry points contained in the statute of *Winchester*, 13 Edw. 1." In *Fitzherbert's Justice of the Peace*, p. 125., under the head of "Where a presentment or certificate made by a justice or by other persons to sessions shall be like a presentment found by the verdict of twelve men," it is laid down, "that the presentment at the sessions by justices of the peace upon their knowledge of such a highway being out of repair, is like the presentment of twelve men, upon which the justices may pass a fine." Now a high constable presents on his own knowledge; he is not bound, on the information of others, to present a highway out of repair, *Anon.* 1 Vent. 337.; and being, like a justice, a person clothed with public authority, his presentment is equivalent to a presentment found by the verdict of twelve men.

Lord TENTERDEN C. J. The instrument prepared by the officer employed by the clerk of the peace, purports, on the face of it, to be an indictment found by a jury; but the subject matter of the charge contained in the instrument, in fact, never was submitted to the consideration of any jury. To warrant such a proceeding, the high constable ought to have gone before the jury and given his evidence on oath. The presentment of a justice on his own knowledge has, by statute, in some cases, the force of a presentment by a grand jury; and those are the cases referred to in *Lambard* and *Fitzherbert*. It is not suggested that the proceeding, in this instance, was warranted by any statute. It is, clearly, bad. The rule must, therefore, be made absolute.

Rule absolute.

1827.

FLETCHER against JOHN HEATH and Others.

*Tuesday,
November 27th.*

TROVER for twenty bales of silk, and twenty warrants for the delivery of the said silk. Plea, not guilty. At the trial before Lord Tenterden C. J., at the Guildhall sittings after Easter term, 1826, the jury found a verdict for the plaintiffs, subject to the opinion of this Court on the following case:

In February 1825 John Billinge, a silk broker, purchased for the plaintiff twenty-four bales of silk lying in the warehouse of the East India Company. The plaintiff paid for the silks when due, and received twenty-four warrants for the delivery of them in the usual form. On the 7th of June 1825, the plaintiff sent the twenty-four warrants to Billinge, inclosed in a letter, of which the following is a copy:

London, 7th June 1825.

Mr. John Billinge,

I enclose you twenty-four East India warrants of silk, with a statement of costs, amounting to 3761l. 13s. 7d. Upon these I have drawn upon you two bills, 1500l., 1550l. 10s., at three months from 6th instant, which please to accept, to stand against the proceeds of said silk when sold.

Mr. Fletcher.

Billinge accepted the two bills above mentioned, amounting in the whole to 3050l. 10s., and returned them to the plaintiff. Billinge could not sell any of the silks before the bills became due. The plaintiff promised to provide funds to pay the bills; but a few days

Where a broker, having accepted bills for his principal on the security of goods then in his hands, pledged the goods with a person who had notice of the agency, but did not inform the principal of this transaction: Held, that under the 6 G. 4. c. 94. s. 5. the broker could only transfer such right as he had, which was a right to be indemnified against the bills which he had accepted; and that the principal having satisfied those bills, was entitled to have back his goods from the pawnee, without paying the amount for which they were pledged.

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 Farrant
 against
 Moxall.

before they fell due, he said to *Billings* that it would be inconvenient for him to do so, and proposed that *Billings* should draw bills upon him, which he would accept, and that *Billings* should get them discounted, and pay his own acceptances. In consequence of this proposal, *Billings* drew upon the plaintiff four bills of exchange, payable to his own order, one, dated 3d September 1825, for 600*l.* at two months, another, of the same date, for 638*l.* at three months; another, dated 8th September 1825, for 700*l.* at three months; another, dated 9th September 1825, for 700*l.* at four months, amounting in the aggregate to 2638*l.* These bills were accepted by the plaintiff, and delivered to *Billings*, who promised to get them discounted, and to take up his own acceptances. On the 5th of September he discounted the bill for 638*l.*; but on the 9th of September, when his aforesaid acceptances became due, and were paid, as after mentioned, he had not discounted any of the others. On that day he went to the counting-house of the defendants, shewed them the plaintiff's letter of the 7th of June, and asked to borrow 3000*l.* upon the security of the warrants, to enable him to pay his said acceptances: he did not mention to the defendants the last-mentioned bills so accepted by the plaintiff. The defendants advanced him 3000*l.* on the credit of the warrants which he left with them, together with the aforesaid letter of the 7th of June 1825. This money he immediately paid into his bankers, where his acceptances were made payable, and without it the bankers had not funds to pay them. In this manner the acceptances were paid on that day. When *Billings* borrowed the 3000*l.*, and left the warrants with the defendants, he had not paid any of his acceptances. *Billings* had no authority from the plaintiff to borrow the said sum of 3000*l.* from the defendants. On the

25th September, *Billinge* carried to the defendants bills for 3366*l.*, desiring them to discount these bills for him, to repay themselves the 3000*l.* they had advanced to him and interest, and to pay him the balance. They did so, and paid him a balance of 269*l.* 7*s.* 1*d.* All the bills accepted by the plaintiff *Billinge* discounted, and applied the proceeds to his own use, but carrying the amount to the plaintiff's credit in their account current. He sold one bale of the silk on the 12th September, and three more on the 2d November. The defendants gave him up the four warrants, and have retained the others in their possession. *Billinge* did not pay the proceeds of the four bales which he sold, to the plaintiff, but he credited his account with the amount. The plaintiff paid all the bills accepted by him as they became due. On the 10th of October 1825, *Billinge* drew upon the plaintiff another bill of exchange, payable to his own order, for 400*l.*, at three months, which was also accepted by the plaintiff, and which *Billinge* applied to his own use. A third set of bills was drawn by the plaintiff on *Billinge*, and accepted by him; one dated 1st December 1825, for 700*l.*, at three months; another dated 8th December 1825, for 800*l.*, at three months; another dated 29th December 1825, for 500*l.*, at three months; and another dated 2d January 1826, for 600*l.*, at three months. *Billinge* stopped payment on the 17th January 1826, and a commission of bankrupt was soon after sued out against him. Till then the plaintiff knew nothing of *Billinge* having borrowed money from the defendants, or having deposited the warrants with them. *Billinge* when he stopped was and still is indebted to the plaintiff in the sum of 494*l.* The plaintiff negotiated the third set of bills accepted by *Billinge*; but he took them up when due, and they have been no charge on

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*Warrants
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Billings's estate. *Billings* was not indebted to the defendants when he deposited the warrants with them; but he was indebted to them when he stopped payment, to the amount of 400*l.* and upwards. The bills for 3866*l.* delivered by *Billings* to the defendants on the 26th September produced to the defendants 2927*l.* Some of them were dishonoured, and remain in their hands, making a deficit of 1089*l.*, besides interest. Before the commencement of the action the warrants were demanded on behalf of the plaintiff from the defendants, who refused to deliver them up, claiming a lien upon them for the balance due to them from *Billings*. The question for the opinion of the Court was, Whether the defendants had any and what lien upon the warrants?

Campbell for the plaintiff. The warrants in question, the property of the plaintiff, were pledged without his knowledge or authority by his agent. The right to do so depends upon the 6 G. 4. c. 94. s. 5. (a) The question then is, Whether, on the 9th of September, when the deposit was made with the defendants, the agent *Billings* had any, and what, lien upon the warrants? He had come under acceptance for the accommodation of the plaintiff to the extent of 3050*l.* 10*s.*, and in order to provide funds to take up those bills, the plaintiff had

(a) By which it was enacted, "That it shall be lawful for any person &c. to accept and take any such goods, or any document (for the delivery thereof) in deposit or pledge from any factor or agent, notwithstanding such person shall have notice that the person making such deposit or pledge is a factor or agent. But in that case such person shall acquire no further or other right, title, or interest in or to the said goods, or any document for the delivery thereof, than was possessed or might have been enforced by the factor at the time of such deposit or pledge as a security; but such person shall and may acquire, possess, and enforce such right, title, or interest, as was possessed and might have been enforced by such factor or agent at the time of such deposit."

accepted

accepted others which *Billinge* had undertaken to get discounted. At the time of the pledge, the first set of bills had not been taken up, and therefore *Billinge* had not disbursed any money for the plaintiff, but had merely incurred a liability. The bills accepted by the plaintiff in the whole amounted to 2636*l.*, leaving a sum of 412*l.* only uncovered, and of these *Billinge* had discounted one for 638*l.* If all the bills were to be placed to the plaintiff's credit, *Billinge*, on the 9th of *September*, could have no lien beyond 412*l.*, or if he gave credit for the 638*l.* only, that would leave 2412*l.* in his favour. But supposing him to have had power to transfer to the defendants a lien to that amount, that was discharged on the 26th of *September* when he took to them bills for 3366*l.* to be discounted, and out of them they repaid themselves the 3000*l.* before advanced, and paid *Billinge* the balance, 269*l.*; for the discount of a bill is a sale of the bill. Thus the defendants, in fact, were paid the whole of that sum by taking credit for it in account with *Billinge*. It is true, that some of these bills were dishonoured; but that could not alter the case, it merely created a new debt from *Billinge* to them. Should it, however, be held that the lien given to the defendants on the 9th of *September* was not discharged by this transaction on the 26th, still it was afterwards discharged by what took place between the plaintiff and *Billinge*. The former paid all the bills drawn by *Billinge* upon him. The bills afterwards accepted by *Billinge* never became a charge upon his estate, for they were all paid by the plaintiff, and he was a creditor of *Billinge* at the time of his failure. *Billinge*, therefore, could have no right to retain these warrants, neither have these defendants, for they having taken them with notice of the agency, can only set up the pawnor's rights, and the principal

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against
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principal cannot be affected by the state of the account between the agent and the pawnee. At common law the agent having a lien, could not transfer it, *Dunbighy v. Davul* (a), *McCombie v. Davies* (b). The object of the recent statute was merely to enable him to do that, and now the pawnee must abide the result of the account between the pawnor and his principal. If, however, the defendants in this case had any lien, it certainly was not to the extent claimed, and the refusal to give up the goods until that claim had been satisfied was a conversion, *Boardman v. Sill* (c).

Reader contra. In that case the defendant did not claim any lien, but asserted a right to retain the goods upon a different ground, and Lord *Ellenborough* said he must be considered as having waived his lien. Here the defendants expressly insisted upon their lien, and their only mistake was claiming too much. The amount due to them is, however, unimportant: nothing was tendered before the commencement of the action, and, therefore, if any thing be due, a nonsuit must be entered. Upon the statute 6 G. 4. c. 94. s. 5., the only question is, What right had the broker at the time of the pledge? He had accepted bills to the amount of 3050*l.*, and even if the counter-acceptances by the plaintiff are to be set against that sum, 412*l.* remained uncovered. Nor was that lien discharged by any thing that took place between *Billinge* and the defendants, or between him and the plaintiff. It has been said that the bills discounted by the defendants were sold to them. The transaction might, perhaps, have been so considered, had the warrants been delivered up or the bills paid; but the former were

(a) 5 T. R. 604.

(b) 7 East, 6.

(c) 1 Campb. 410.

retained

retained as a collateral security, and upon the bills there was a deficit of 1089*l*. Then as to the subsequent dealings between the plaintiff and *Billings*. At the time of the pledge, the latter had accepted bills upon the security of certain warrants. To the extent of these acceptances he had a lien, and that he transferred to the defendants: it was not a defeasible but an absolute lien, and the defendants have a right to stand in the same situation as the broker was in at the time of the transfer, unless the specific lien then acquired has been paid off. It is clear that it never has been paid off, and that the defendants are entitled to retain the warrants either for the sum of 1089*l*. or 412*l*. [Lord Tenterden C. J. The owner of goods deposits warrants and draws a bill, which is accepted: the acceptor has a lien while the bill is running; but when at maturity he does not take it up, and the drawer does so, what becomes of the lien? If the acceptor, under such circumstances, has it not, how can he, before the bill becomes due, transfer an absolute lien?] At all events, he had an absolute lien for 412*l*.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

It being clear that the defendants in this case could not, by the common law, acquire a lien upon the warrants by the pledge of the broker *Billings*, the question upon the argument was, Whether he had acquired such a lien under the provision of the fifth section of the late statute 5 G. 4. c. 94? By the plaintiff's letter of the 7th of June 1825, which was communicated to the defendants by *Billings*, at the time of depositing the warrants with them, the defendants were informed that *Billings* held those documents as an agent, and, therefore,

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against
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fore, according to the terms of the statute, they could acquire no further or other right, title, or interest in them, than was possessed and could have been enforced by *Billinge* at the time of the deposit, that is, on the 9th of September. And we are, therefore, to see what right or interest *Billinge* had at that time. In the month of June, *Billinge* had acquired a right to hold these warrants as an indemnity against two bills of exchange accepted by himself for 3050*l.* 10*s.*, which fell due on the 9th of September. The amount of the bills was to stand against the proceeds of the silk when sold. It was probably expected that sales would be made so as to meet these bills; but that had not been done: and the plaintiff had promised to find funds to meet them; but this becoming inconvenient, it was agreed between them that *Billinge* should draw bills upon the plaintiff, discount them, and with the proceeds discharge his own acceptances: and he did, in fact, before the deposit with the defendant, draw, and the plaintiff accepted, four bills to the amount of 2638*l.*, and he, *Billinge*, might then have drawn for the remaining 412*l.* 10*s.* if he had thought proper, as he soon afterwards did for 400*l.* The right, therefore, of *Billinge* was to an indemnity against bills of exchange: and the fact that a still further acceptance of bills afterwards took place, does not alter the nature of his right. If in the result of the transaction, *Billinge* discharged the bills out of his own funds, his right would be converted into a lien for money actually advanced, and the plaintiff must repay the money to have the warrants. If in the result of the transaction the bills were all discharged by the plaintiff's money, or by the sale of his goods, the right of *Billinge* would cease and become void, and the plaintiff become entitled to the possession of the warrants. And from the failure of *Billinge* this event

event happened. The plaintiff had the same right to receive the warrants from the defendants as he would have had to receive them from *Billings*, or the assignees under his commission, if they had never been deposited with the defendants; the right of the defendants being at its commencement, and throughout the whole time until the close of the transaction, the same and no other than the right of *Billings*. We therefore think the defendants had no lien on the warrants, and the *postea* is to be delivered to the plaintiff.

Postea to the plaintiff.

KEAT and Another against GOLDSTEIN and
CASTLES.

Wednesday,
November 28th.

A BAILABLE action against the two defendants was entered in the Mayor's Court, *London*, on the 25th of April 1827, upon an affidavit of debt for 116*l*. An attachment issued thereon upon monies and goods in the hands of one *Thomas Walter*. On the 28th of August a certiorari issued to remove the proceedings into this Court. On the 20th of September a rule for bail was served, and bail was put in for *Goldstein*, but not for *Castles*. In this term *Comyn* obtained a rule nisi for quashing the certiorari, and issuing a procedendo upon an affidavit setting forth the facts above mentioned; and also, that by the practice of the Mayor's Court, an attachment against two persons cannot be released or dissolved unless bail is put in for both.

Where one of several defendants, in a proceeding by foreign attachment in the Mayor's Court of *London*, removes it by certiorari, he must put in bail in K. B. for all the defendants, otherwise a procedendo will be granted.

Goldstein shewed cause, and contended that *Goldstein* could only be compelled to put in bail for himself. That, in any case committed in this Court, a defend-

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1884.

Kear
against
GOLDSMITH.

ant was not bound to put in bail for co-defendants; and that, when a cause was removed by certiorari from an inferior court, the parties were here only bound to do that which would have been incumbent on them if the suit had been commenced in this Court.

BAYLEY J. Suppose the case of two persons being served with process out of an inferior court; one of them sues out a writ of certiorari, and appears in the court above for himself alone. The case is certainly not well removed, and that is in fact the very case before us. There is no hardship in this. The cause was commenced in the court below, and the attempt to remove it fails because both the defendants are not before this Court.

Rule absolute.

Wednesday,
November 28th.

BAKER against ALLEN.

Where a bill of *Middlesex* issued upon an affidavit of debt duly sworn, and that was followed up by a latitat into *Surrey*, upon which the party was arrested: Held, that the latitat was only a continuance of the former process, and that it was not necessary that a fresh affidavit of debt should be made.

IN this case an affidavit of debt was made at the bill of *Middlesex* office before the proper officer. A bill of *Middlesex* was issued, and afterwards a latitat into *Surrey*, whereupon the defendant was arrested and gave bail. An office copy of the affidavit of debt sworn at the bill of *Middlesex* office was filed at the office of the signer of the writs before the latitat issued, but no other affidavit of debt was made before that officer. *Barstow* obtained a rule nisi for delivering up the bail-bond to be cancelled, on the ground that an affidavit should have been made before the signer of the writs or his deputy, the statute 12 G. 1. c. 29. s. 2. requiring that before any arrest takes place, an affidavit of debt shall be made before

before a judge or commissioner of the Court out of which the process issues, or before the officer who issues the process or his deputy.

1837.

BARR
against
ALLEN

Hutchinson, on a former day in this term, shewed cause, and contended that the latitat was merely a continuance of the bill of *Middlesex*, which it was formerly necessary to issue in all actions by bill. He relied on *Dorville v. Whoompall* (a), and *Evans v. Bidgood* (b).

Baxton, contra, relied upon *Dalton v. Barnes* (c), *Boyd v. Durgand* (d), *Anderson v. Hayman* (e).

Cur. adv. vult.

LORD TENTERDEN C. J. It appeared in this case that a bill of *Middlesex* had issued upon an affidavit properly sworn at the bill of *Middlesex* office; and that that process was followed up by a latitat, upon which the defendant was arrested. A copy of the affidavit so sworn was filed with the signer of the writs before the latitat issued; but it was objected that there ought to have been another affidavit made before that officer or his deputy. We think, however, that the latitat was only a continuance of the bill of *Middlesex*, and therefore the statute was satisfied by the affidavit sworn before the officer who issued the first process.

Rule discharged (f).

(a) 3 Bing. 39.

(b) 4 Bing. 63.

(c) 1 M. & B. 230.

(d) 2 Taunton, 161.

(e) 2 B. Moore, 192.

(f) See *Plummer v. Woodburne*, 4 B. & C. 625.

1827.

Wednesday.
November 28th.

Ex parte E. HORSFALL.

An attorney, upon receiving the amount of his bill, is bound to deliver up to his client, not only original deeds, &c. belonging to him, but also the drafts and copies.

A RULE nisi had been obtained for setting aside an order made by *Bayley J.*, and which had afterwards been made a rule of Court, whereby *Lythgoe*, an attorney of this Court, was ordered to deliver up the drafts, copies, &c. of certain deeds then in his custody. It appeared that *Lythgoe* had been employed for several years by Mr. *Horsfall* as an attorney. After his death, his daughter, *E. Horsfall*, applied to have all deeds, papers, &c. in *Lythgoe's* possession delivered up, and offered to pay whatever bill was due to him. *Lythgoe* delivered up all the deeds and original documents, but claimed a right to retain the drafts and copies, which his client had paid for. Upon a summons, *Bayley J.* made an order upon him to deliver them up. That order was made a rule of Court, and in this term a rule nisi for setting aside that rule and order was obtained.

Joshua Evans was now heard against the rule, and the *Solicitor-General* in support of it.

LORD TENTERDEN C. J. It may be convenient in some cases to leave drafts and copies of deeds or other documents in the hands of an attorney; but the client is the proper person to judge of that. He who pays for the drafts, &c. by law has a right to the possession of them. The rule must be discharged.

Rule discharged.

1827.

GIBBINS and Another, Assignees of ASTON, a
Bankrupt, *against* PHILLIPPS (a).

TROVER for certain goods and chattels which had been the property of the bankrupt, alleging in one count a conversion before the bankruptcy, in another a conversion after the bankruptcy. Plea, not guilty. At the trial before *Littledale J.*, at the *Staffordshire* Summer assizes 1827, it appeared that the action was brought against the defendant, as late sheriff of *Staffordshire*, to recover certain property seized by him under a fieri facias issued against the bankrupt after an act of bankruptcy had been committed. An attempt was made on behalf of the plaintiffs to prove several acts of bankruptcy prior to the levy; but the only one which it is material to notice was a bill of sale of his household property, which the bankrupt gave to his sisters, for the alleged consideration of 700*l.*, a few days before the fi. fa. in question issued. It appeared that he was indebted to them in the sum of 530*l.*, but they had never pressed him for payment, and the bill of sale was voluntarily given by him, with a remark that he had made it for 700*l.*, as they might be called upon to pay for some of the furniture which had been recently purchased; but it did not appear that the sisters were legally liable to this demand.

Where a trader, in embarrassed circumstances, gave a bill of sale of part of his property to a particular creditor: Held, that, upon a question, whether this was an act of bankruptcy within the 6 G. 4. c. 16. s. 5., it was properly left to the jury to say, whether it was a voluntary deed, and given in contemplation of bankruptcy.

(a) The Judges of this court sat, as on former occasions, from Friday the 26th day of November to Saturday the 15th day of December inclusive. During that period, this and the following cases were argued and determined.

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There

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GIBBINS
against
PHILLIPS.

There was strong evidence to show that the bankrupt at this time knew he must stop payments. The learned Judge, in summing up the case to the jury, observed, that "by the 6th of the 4th c. 16th s. 3, it was enacted, 'That if any trader shall make any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, &c., or make any fraudulent gift, delivery, or transfer of any of his goods or chattels, with intent to defraud or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy.' The plaintiffs say the bill of sale was a fraudulent grant of some of his goods, with intent to delay his creditors; and if it were so, it was an act of bankruptcy." The learned Judge then made some observations, tending to show the absence of fraud in fact; and then added, "The most important thing to be considered is, whether this was a voluntary deed, and done in contemplation of bankruptcy? for then it would be a fraudulent deed." The jury having found a verdict for the defendant, the learned

Taunton, in last *Michaelmas* term, moved for a writ of *habere corpus ad subducendum* on various grounds, and relied upon this as a *sub* direction, for which he cited *Pulling v. Tucker* (1824) as a rule nisi was granted; against which

Campbell, Russell Serje., and *Barstow* showed cause, and at this point contended, that the direction of the learned Judge was consistent with the decision in *Pulling v. Tucker*. That case did not decide that a deed conveying goods and chattels was fraudulent

upon which it was pronounced
(a) 4 B. & A. 382.

bank-

bankruptcy, merely because made voluntarily, if it were not fraudulent in fact, nor made in contemplation of bankruptcy. If that were otherwise, the richest traders might be in danger of bankruptcy every day, for they could never pay a debt safely until after demand made, unless they at the same time paid all their creditors; for such payment might be considered giving a preference to the creditor paid. In *Pratling v. Tait* there were abundant proofs of fraud in fact; and *Alcock C.J.* observed, that if it were material that the deed should have been made in contemplation of bankruptcy, there was abundant evidence of that fact. *Bayley J.* In that case, although the question of contemplation of bankruptcy was not put distinctly to the jury, yet a new trial was refused, because the Court thought the deed was made when the trader was in such circumstances that he must have contemplated bankruptcy. That may be collected from the whole of the judgment taken together; and although the Lord Chief Justice remarked, that in *Morgan v. Horseman (a) Mansfield C.J.* did not rely upon the express statement that the thing was done in contemplation of bankruptcy, that leaves the case in precisely the same situation; it merely shews that the Court of Common Pleas thought the deed fraudulent if made under circumstances in which the trader must be presumed to have expected bankruptcy. In that case, too, it was expressly stated that the deed was fraudulent; and although the Lord Chief Justice did not in terms rely on those words, his judgment must be construed with reference to the case upon which it was pronounced.

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 Grants
 against
 Pillars.

(a) 3 Taunt. 241.

1827.

Grimes
against
Phillips.

Taunton, Whateley, and Holroyd, contra. The direction of the learned Judge was not consistent either with the words of the statute 6 G. 4. c. 16. or the decision of this Court in *Pulling v. Tucker*. In that case the learned Judge who tried the cause left it to the jury to say whether the conveyance was fraudulent, voluntarily made by the bankrupt in order to give a preference to particular persons to the prejudice of his general creditors; for if so, it was an act of bankruptcy. The Lord Chief Justice *Abbott*, in giving judgment on the motion for a new trial, adopted the language of *Mansfield C.J.* in *Morgan v. Horseman*, that "a conveyance either of all or part of a man's property, in favour of fewer than all his creditors, is an act of bankruptcy, because it is the means whereby the creditors may be defeated or delayed." And *Best J.* observed, that "*the stat. J. 1. c. 15. does not require that the conveyance should be made in contemplation of bankruptcy, but it is sufficient if it be such whereby the creditors may be delayed.*" Neither is there any thing in the stat. 6 G. 4. c. 16. about contemplation of bankruptcy. Those words must, if they mean any thing, import that the bankrupt looks forward to bankruptcy as a consequence of his act. But there may be many cases in which a bankrupt may give a fraudulent preference to one creditor for the very purpose of avoiding a bankruptcy, and yet it would be an act of bankruptcy. The learned Judge put to the jury two things as necessary to make this bill of sale operate as an act of bankruptcy, viz. that the deed was voluntary and in contemplation of bankruptcy, whereas it should have been in the alternative, viz. whether it was voluntary with intent to defeat or delay creditors, or in contemplation of bankruptcy. For the intent to defeat or delay

1827.

 GIBBES
 against
 PHILLIPS.

delay creditors, and the contemplation of bankruptcy, are not convertible expressions. If a deed in favour of a particular creditor be made in contemplation of bankruptcy, no doubt it must defeat or delay other creditors; but it may also have that effect although bankruptcy be not in the contemplation of the party making it; and according to *Pulling v. Tucker*, the latter was the proper question for the consideration of the jury. Where a man is perfectly solvent, a deed providing for the payment of a particular creditor will not have the effect of defeating or delaying the others, but it will have that effect where the party is insolvent, although he may not contemplate bankruptcy, and although he may execute the deed for the express purpose of avoiding bankruptcy. [Bayley J. If in this case there was no contemplation of bankruptcy, what was there to make the deed fraudulent?] Suppose a trader to hear that a particular creditor intended to strike a docket, and in order to avoid that, to give a security or transfer goods to provide for the debt, that would be an act of bankruptcy, although the very object of the trader would be to avoid bankruptcy. [Bayley J. You seem to treat contemplation of bankruptcy as the contemplation of a commission of bankruptcy, which is not the legal meaning of that expression.] If the expression is open to such different constructions, it could hardly be expected that a jury would understand it; the matter would have been much more intelligible to them had the question been put in the words of the statute, and in the manner approved of by the Court in *Pulling v. Tucker*, viz. Whether the bill of sale was given voluntarily, and in order to prefer a particular creditor, and whereby the rest of the creditors might be defeated or delayed?

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BAYLEY J. I am of opinion that there ought to be a new trial, but that it can only be had upon payment of costs, inasmuch as there does not appear to have been any misdirection on the part of the learned Judge, considering his summing up with reference to the facts of this particular case. It was necessary that there should be two ingredients in the transaction of the bill of sale, in order to make it an act of bankruptcy, viz. fraud, and the delay of creditors. It certainly appeared that the bill of sale was given by the bankrupt of his own will, and not on pressure or demand by his sisters, but it was not, therefore, necessarily fraudulent, it was incumbent on the plaintiffs to shew fraud aliunde. If the party so securing the debt had been solvent, the transaction could not have been deemed fraudulent, although it might have the effect of delaying other creditors, but if he knew himself to be in such a situation that he must be supposed to have anticipated that a bankruptcy would in all human probability follow, then I think it was fraudulent within the meaning of the 6 G. 4. c. 16. In this sense contemplation of bankruptcy has always been considered evidence of fraud, although the party may not have expected the actual and immediate issuing of a commission. Nor does this appear to me by any means at variance with the decision in *Pulling v. Tucker*. That merely decided that it was not necessary in every case to put the question of contemplation of bankruptcy to the jury in express terms. In *Morgan v. Horseman* the whole Court of Common Pleas appear to have assumed that the thing was done in contemplation of bankruptcy. In the present case I think the learned Judge did right in leaving to the jury the question as to the opinion of the bankrupt respecting the state of his affairs, rather than

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the intent to defeat or delay other creditors; and if any doubt had been entertained at the time, as to the language used being intelligible to the jury, a suggestion of counsel as to that would have been attended to, and the supposed difficulty obviated.

1827.

GIBBINS
against
PHILLIPS.

Rule absolute on payment of costs (a).

(a) At the *Stafford* Lent assizes, 1828, the cause was again tried before *Parke J.* The plaintiffs, in order to prove the seizure of the goods by the defendant, gave in evidence a warrant issued by the under-sheriff, under the sheriff's seal of office, but did not produce the writ of *feri facias*. For the defendant, it was contended, that the under-sheriff had authority to take warrants in those cases only in which writs were lodged at the sheriff's office, and that unless the writ of *feri facias* in this case were produced, it would not appear that the under-sheriff acted within the scope of his authority. The learned Judge overruled the objection, and the plaintiffs obtained a verdict.

In an action of trover against the sheriff for goods taken in execution, it is sufficient for the plaintiff to give in evidence the warrant issued by the under-sheriff, under the sheriff's seal of office, and he is not bound to prove the writ.

In *Easter* term, *Campbell* moved for a rule nisi for a new trial, and renewed the former objection.

Per Curiam. The warrant was produced in evidence, bearing the sheriff's seal of office, and it was right to presume that the seal was properly affixed, unless evidence to the contrary was adduced. The plaintiffs therefore established a *prima facie* case against the sheriff by the production of the warrant; and if the under-sheriff had improperly issued it without having received a writ, upon which it purported to be founded, the defendant might have proved that as an answer to the plaintiffs' case.

Rule refused.

1827.

Where a person employed by an attorney to keep possession of goods seized under a fieri facias made complaint to a magistrate, that he could not obtain payment for his services, and the magistrate having summoned the party, and heard the complaint, proceeded under the 22 G. 2. c. 19., and made an order upon the attorney for payment of a certain sum, which was afterwards levied on his goods: Held, that the magistrate was liable to an action of trespass, for that the service performed was not of such a nature as to give him jurisdiction under the 22 G. 2. c. 19.

BRANWELL against PENNECK.

TRESPASS, for, breaking and entering plaintiff's dwelling house, and seizing his goods and detaining them until he paid the sum of 11. 2s. 6d. Plea, not guilty. At the trial before Burrough J. at the last Summer assizes for Cornwall, it appeared, that the plaintiff was an attorney residing at Penzance, and the defendant at the time of the alleged trespass was mayor of that town, and in virtue of his office a justice of peace. In December 1826 one Richards was employed by the plaintiff to keep possession of certain goods seized under a fieri facias issued by the plaintiff, on behalf of a client, out of the borough court of record of Penzance. The warrant was, by the plaintiff's desire, directed to Richards, who was left in possession for five days, and in consequence of some dispute with the plaintiff, being unable to obtain payment for his trouble, he laid an information upon oath before the defendant, who summoned the plaintiff, and after hearing the complaint and answer, made an order upon the plaintiff to pay to Richards 13s. 6d. The plaintiff having refused to obey the order, a warrant was granted by the defendant, which recited, that Richards, of, &c., labourer, had complained unto him (defendant), that he was employed by Branwell, and sent to the house of A. B., and there employed to take care of certain goods taken in execution, where he continued for five days; that he, Richards, had duly performed that service, and that no particular wages were specified; it then recited the previous proceedings before

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the mayor, and the plaintiff's refusal to obey the order before mentioned, and then directed that the sum of 19s. 6d. and expences should be levied on the goods of the plaintiff. It was contended, that as *Richards's* name was inserted in the warrant under which the goods of which he had to keep possession were seized, he was in the situation of a bailiff, and, therefore, could not claim to be paid by the attorney; and, further, that if this were otherwise, still *Richards* was not a labourer within the meaning of the statute 20 G. 2. c. 19. The learned Judge adopted this view of the case, and the plaintiff obtained a verdict for 19s. 6d. In Michaelmas term a rule nisi for a new trial was granted, and *Foster v. Blakelock* (a) was cited to shew that a bailiff has a right to be paid by the attorney who employs him.

Philcomb shewed cause. If the magistrate had no jurisdiction in this case, it is immaterial by whom the party ought to be paid (b). The question of jurisdiction depends upon the 20 G. 2. c. 19. By this statute, after a recital that the laws then in being for the better regulation of servants, and for the payment of wages to them, and to artificers, handicraftsmen, and labourers, were insufficient and defective, it was enacted, "that all complaints, differences, and disputes which shall happen and arise between masters or mistresses and servants in husbandry hired for one year or longer, or which shall happen or arise between masters or mistresses and artificers, handicraftsmen, miners, colliers,

(a) 5 B. & C. 528.

(b) As the case was ultimately decided on the question of jurisdiction, under statute 22 G. 2. c. 19, the arguments arising out of the fact of *Richards's* name being in the warrant have been omitted.

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keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time or in any other manner, shall be heard and determined by one or more justice or justices of the peace of the county, &c. where such master or mistress shall inhabit, although no rate or assignment of wages has been made that year by the justices of the peace of the shire, &c. where such dispute shall arise." By the second section, the magistrate is empowered to punish the servant for misconduct by non-payment, reduction of wages, or discharging him from service; and in case the servant or labourer is ill used, the magistrate may release him from his service. *Louther v. Lord Radnor* (a) will no doubt be cited for the defendant; but there the party complaining had been employed as a labourer, although not in any of the particular occupations enumerated in the statute; he might, therefore, fairly be considered as included in the general words *other labourers*. *Richards*, the person complaining in this case, could not with any propriety be called a labourer on account of his employment by the plaintiff; nor was his situation such as to authorize the interference of the magistrate between him and his employer in the manner pointed out by the second section of the act.

C. F. Williams and Carter, contra. The object of the statute 20 G. 2. c. 19, is clearly pointed out by Lord Ellenborough in *Louther v. Lord Radnor*, where he says, "The act now under our consideration appears to have had for its object the affording to certain servants and workmen, and to labourers in general, a speedy, easy, and cheap mode of recovering their wages, when they are not paid at the time to which they are entitled by agreement." (q) 8 *Ess.* 115.

amount

amount to a small sum." Such a statute should receive a liberal construction; and as there was no more reason in that case to call the party claiming wages a labourer than there is in this, the decision, which was in favour of the justice, is a direct authority for the present defendant. [Hobroyd J. The warrant does not contain either an allegation or recital that *Richards* was a labourer, but it sets out the specific employment in respect of which the wages were claimed.] Although he was not so described, yet if the service there mentioned shews that the case was within the statute, the warrant is good, and the magistrate is protected.

BAILEY J. I am of opinion that the magistrate had not any jurisdiction to make the order for payment of wages to *Richards*, for it seems to me that *Richards* was not that sort of labourer, nor the service rendered by him that sort of labour, which is mentioned and intended in the 10 G. 2. c. 19. That statute recites, that the existing laws for payment of wages to servants, and to artificers, handicraftsmen, and labourers, were defective, and then provides a mode of settling disputes between masters and certain descriptions of persons, and other labourers, although no rate or assessment of wages has been made that year by the justices of the peace for the shire, &c. where such complaint shall be made, or such disputes arise. Those words imply, that the legislature did not contemplate all labourers, but those only with reference to whom the justices had power to make a rate of wages. Now, looking at the statute 5 Eliz. c. 6, the justices are thereby empowered to settle the rate of wages "of such artificers, handicraftsmen, husbandmen, or other labourers, servants,

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against
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vants, or workmen, whose wages had in time past been fixed by law, and also of all other labourers, artificers, workmen, or apprentices of husbandry, whose wages had not been fixed; and these wages are to be fixed by the year, day, week, or month, and what wages every workman or labourer shall take by the great, for mowing, reaping, or threshing of corn, or for mowing or making of hay, or for ditching, paving, &c. and for any other kind of reasonable labour and service. This latter part shews that the legislature had principally in view outdoor work or country labour. And the statute appears to have received this construction; for, by the 1 J.1. c. 6., after reciting that questions had arisen, whether the former act gave any new jurisdiction except as to persons that worked in husbandry, it was enacted, "that the provisions should extend to any labourers, weavers, spinsters, and workmen whatsoever, either working by the day, week, month, or year, or taking any work to be done in great or otherwise." That explains still further the various descriptions of persons whose wages might be fixed by the magistrates at the time when the 20 G. 2. passed; and for the work to be done by the several persons mentioned, there would be no difficulty in fixing a rate of payment. In *Louther v. Lord Radnor*, the work done was digging, the workman was clearly a labourer, and within the statute. In the present case, there was no work or labour done by *Richards*; his was not an employment for which it could be expected that magistrates could fix the proper remuneration. For these reasons, I think that the defendant went beyond his jurisdiction in making the order in question, and that the rule for a new trial must be discharged. It appears to me that there is weight also

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in the argument derived from the second section of the 20 G. 2. c. 19.; for this was not a case in which it could be intended that the magistrate should interfere in the manner pointed out by the statute.

1827.

BRANWELL
against
PARKER.

HOLROYD J. I entirely agree with the opinion expressed by my Brother *Bayley*; and if his construction of the statute 20 G. 2. c. 19. were not correct, I know not how we could say that its provisions do not extend to bankers' or merchants' clerks, and other persons of that description. The claim in this instance was for a remuneration for keeping possession of goods seized under a *fieri facias*. That appeared upon the warrant, and the party was not therein alleged to have done work as a labourer. It seems to me that this is a decisive objection to the warrant; but upon the broad ground, also, that the magistrate had no jurisdiction, I think that the plaintiff was entitled to a verdict.

LITLEDALE J. I am of the same opinion. The claim as stated by *Richards* and in the warrant was not within the statute 20 G. 2. c. 19. The words *other labourers*, there used, are only applicable to persons of the same description as those specially mentioned, and the labourers intended are those whose wages might be fixed by the justices. The statute 5 Eliz. c. 4., which relates to the fixing of wages of labourers, has in section 12. a regulation as to the number of hours during which they may be required to work. That provision explains what sort of labourers were intended in the former part of the act, and is wholly inapplicable to such services as were performed for the present plaintiff by *Richards*; and the nature of the service on similar occasions

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BRANWELL
against
PENNECK

occasions is so uncertain as to make it impossible to fix a priori any rate of wages. I am, therefore, of opinion, that the legislature never intended to give justices of the peace power to interfere in such cases, and that the defendant, having acted without jurisdiction, was liable to the action. The rule for a new trial must, therefore, be discharged.

Rule discharged.

JOHN JONES against **TANNER, Executor of**
BENJAMIN JONES.

An action at law for a distributive share of an intestate's property cannot be maintained against the administrator, nor against his executor, although he may have expressly promised to pay.

ASSUMPSIT on the money counts, and account stated, alleging promises by the testator. Fifth count alleged that testator was indebted to the plaintiff for money lent, money paid to his use, money had and received by him to plaintiff's use, and for money due to the plaintiff on an account stated between them; and that the said sums of money remaining unpaid, defendant, as executor, promised to pay. Sixth count, on an account stated by the defendant of monies due to the plaintiff from him as executor. Pleas, non-assumpsit, set-off, and the statute of limitations, upon which issues were taken. At the trial before *Burrough J.*, at the last Summer assizes for Somerset, it appeared that the plaintiff and Benjamin Jones were sons of William Jones, who died intestate in 1803, leaving five children. B. Jones took out administration to his father, and possessed himself of all his effects. B. Jones died in July 1826, having by his will appointed the defendant his executor. After B. Jones's death, an application

plication was made to the defendant for 70*l.*, as the plaintiff's share of his father's property. The defendant said it was right, and should be paid, and he produced an account from *B. Jones's* books, by which it appeared, that upon a division of the property each of his father's children would be entitled to 70*l.* An attempt was also made to prove an acknowledgment by the testator, shortly before his death, that he had received 200*l.* of the plaintiff's money. For the defendant it was contended, that the evidence as to the 200*l.* was not sufficient to be left to the jury, and as to the 70*l.*, that an action at law could not be maintained for a distributive share of an intestate's property. The learned Judge overruled this objection, and left the whole case to the jury, who found a verdict for the plaintiff for 270*l.* He then gave the defendant leave to move to reduce the verdict to 70*l.* In *Michaelmas* term a rule nisi for a new trial was granted, and now

1827.

Jones
against
Tennant

Ex parte and *R. Bayly* shewed cause. They did not insist upon the claim of the 200*l.*, but contended that an action was maintainable upon the defendant's express promise to pay the plaintiff's share of his father's property. The acknowledgment that the demand was right was equivalent to an admission that *B. Jones* had received so much money to the use of the plaintiff, and the promise by the executor bound him to pay it. Or if the evidence be applied to the count on the set-off stated by the defendant, it was an admission that he, the defendant, had received so much money due to the plaintiff from the testator. [*Holroyd J.* There was not any proof that *B. Jones* ever made distribution of his father's property, so as to ascertain what

1889!

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Thomson

what was due to the estate. [The executor was bound to pay the amount who made a promise to pay after he had seen the account, and after a specific sum had been ascertained, that may be presumed, and then the case is precisely similar to that of *Gorton v. Dyson* (a) [Bayley J. In this case the account did not show that the money ever was in B. Jones's hands. He took the whole of his father's property, and as he had assets, he would have been bound by an express promise to pay, according to *Akins v. Hill* (b), and *Thurley v. Saunders* (c). The case of *Beck v. Smith* (d) was different, for there the executor had not made an express promise to pay, which circumstance was particularly noticed by *Grose J.* [*Littledale J.* The judgment of Lord Kenyon C. J. did not proceed upon this distinction, and has always been considered as an unqualified decision that an action at law cannot be maintained for a legacy.]

C. F. Williams and Carter, contra, were stopped by the Court.

BAYLEY J. This is certainly a very singular action. In the first place, it is for a distributive share of an intestate's property, which cannot be recovered in this Court. The right arises altogether out of the statute 22 & 23 Car. 2. c. 10. and that gives it sub modo: the administrator is not to make distribution until a year has elapsed from the intestate's death, and he is then to take a bond conditioned to refund part of the money,

(a) 1 B. & R. 219.

(c) *Comp.* 289.(b) *Comp.* 284.

(d) 5 T. R. 690.

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Jones
against
Tanner.

if that affidavit appears satisfactory for the payment of creditors. The suit for the share should be in a court where that bond can be called for. Then, against whom does the right exist? Clearly against the personal representative of the intestate. *W. Jones*, the father, was the intestate; and the defendant is not his personal representative. The plaintiff is, therefore, suing in a court of law upon a right which cannot be enforced there, and the action is against a person not in any way liable to the demand. The defendant is sued as executor of *B. Jones*, and a promise made by himself is relied on. But such a promise will not bind if made without sufficient consideration; and as it does not appear that *B. Jones* ever made himself personally liable, there was no consideration for his executor's promise to pay. The plaintiff has, therefore, made a double mistake; he has sued the wrong person, and in the wrong court. The rule for a new trial must be made absolute.

HOLROYD and LITLEDALÉ J^s. concurred.

Rule absolute.

1887.

The King against The Inhabitants of Brington.

A woman seized of a messuage, &c. in the parish of *A.*, as tenant in common with her three sisters, married, and resided for some years with her husband in the parish of *B.*, where he was legally settled. The husband was transported, and the wife, sometime afterwards, went with her daughter to live in the messuage in *A.*, in which one of her sisters resided. Held, that she was irremovable; and the sessions having quashed an order removing her and her daughter, it was presumed that the latter was within the age of nurture, and therefore irremovable.

UPON appeal against an order of two justices, whereby they removed *Maria*, the wife of *Edward Chambers*, then a convict at *Van Diemen's Land*, and *Mary Elliott*, their daughter, from the parish of *Brington*, in the county of *Northampton*, to the parish of *Bedby*, in the same county; the sessions quashed the order, subject to the opinion of this Court, as to whether, under the following circumstances, the pauper was removable:—

John Elliott, in consideration of a marriage intended between himself and *Mary Thornton*, by indentures of lease and release and settlement of the 6th and 7th January 1772, granted and released a messuage in *Little Brington*, and about twenty acres of land, to trustees to the use of himself till the marriage; remainder to himself for life; remainder to trustees to support contingent remainders; remainder to the use of the said *Mary Thornton* for life, in full of jointure; remainder to trustees, their executors, &c. for 500 years from the decease of the survivor of the said *John Elliott* and *Mary Thornton*, subject to the trusts thereafter declared; and after the expiration of the said 500 years, and subject thereto, remainder to the use of the first son of the body of the said *John Elliott* on the body of the said *Mary* lawfully to be begotten, and the heirs of such first son lawfully issuing; remainder to the use of the second, third, fourth, and all and every other the son and sons of the body of the said *J. Elliott* on the body of the said *Mary* lawfully

lawfully begotten, successively, in seniority of age and priority of birth, and the heirs of his and their body and bodies lawfully issuing, the elder of such son and sons, and the heirs of his and their body or bodies, being to be preferred; remainder to the use of all and every the daughter and daughters of said *J. Elliott*, on the body of the said *Mary* lawfully to be begotten, and the heirs of the body and bodies of all and every such daughter and daughters, the said daughters, if more than one, to take as tenants in common; and for want of such issue, to the use of *J. Elliott*, his heirs and assigns for ever." The marriage took effect, and there was issue four sons and eight daughters, all of whom died without issue, in the lifetime of their mother, except four daughters, viz. *Elizabeth*, *Alice*, *Maria*, and *Sophia*, who survived her. *Maria*, the pauper, intermarried with and is now the wife of *Edward Chambers*, whose legal settlement is in the parish of *Badby*, where she was living until *February 1826*, (her husband being at that time, and continuing at the date of the order of removal, absent from *England*;) when she went to *Brington* (the parish in which the property lies) to her sister's, who lives in the house mentioned in the marriage-settlement, and resided there thirteen weeks, until she was removed to *Badby*.

Holbeck in support of the order of sessions. The pauper has an equitable estate in the premises from which she was removed, as tenant in common in tail with her sisters, and she was not removable from her property. In *The King v. Hythorpe Rooding (a)*, the wife, upon being left by

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The King
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The Inhabit-
ants of
Barnston.

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against
The Inhabit-
ants of
Buxton.

her husband, went to reside in a copyhold tenement of her husband's in *Aythorpe Robbing*, and she was held to be irremovable from her husband's property; but the present case is stronger, because here she was residing on her own estate, of which her husband had only a joint seisin in her right. A party residing on his own estate acquired by purchase, even if it be under the value of 30*l.* is irremovable, but he would not thereby gain any settlement in consequence of the provisions of the statute 9 G. 1. c. 7. *Rex v. Murthey* (a). And mere residence for forty days, in a parish where the estate of the party is, confers a settlement, provided it be of sufficient value, although the owner has not the actual possession, *Rex v. Hasfield* (b), *Rex v. Froghston le Spring* (c), or has not an exclusive right, but merely in common with others; as, for instance, an estate as tenant in coparcenary, *Rex v. Dorston* (d). A fortiori, the wife who was residing on her own estate, of which she was tenant in coparcenary, was irremovable.

Dwarris and *Humfrey* contra. The pauper was not irremovable, because she had no present estate in the premises, as the right of possession and the right to take the rents and profits were in the husband. She could not alien by common law; and the modern subtleties of trusts and powers and uses, to enable her to alien, shew that at common law she had no present estate. She could not interfere in the management of the estate, and, therefore, the reason upon which the right to reside in the parish is founded, viz. the right to superintend her property, does not apply. *Rex v. Easting-*

(a) 5 *East*, 40.
(c) 1 *East*, 247.

(b) *Burr.* 5. C. 747.
(d) 1 *East*, 296.

for (a) shews that she could not gain a settlement by residing on this land, if the right of possession were in her husband. A mere right to possession is not sufficient to make a person irremovable; as, for instance, when a woman is entitled to dower, but there has been no actual assignment, *Rex v. The Inhabitants of North Weald Basset* (b). Again, although the residence need not be on the premises, yet it should be with reference to them; but here she merely went to visit her sister. *Rex v. Ashton-under-Lyne* (c) shews that there must be an intention of residing. The case of *Rex v. Authorppe Rooding* (d) is distinguishable from this. The wife was not chargeable there; and as no dissent appeared on the part of her husband from her going into that parish, the Court presumed his consent, as he had gone away, and she went to his property. But here the wife resided in the parish of the husband's settlement for some time after his absence, and then went to her own parish. His consent cannot, therefore, be presumed. Besides, in *Rex v. Authorppe Rooding* she went to the husband's property, which, during his absence, required some one to manage it. There was no joint occupation, as in this case, by the sister. If the wife be irremovable, it will follow that the mere accidental residence of a workman on a job in a parish where he has any property will make him irremovable. Besides, the order of removal comprehends the daughter as well as the wife. Now it does not appear that the daughter was within the age of nurture, and if she was not, then she might be removed, without her mother, to her (the daughter's) place of settlement. The daugh-

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The King
against
The Inhabitants of
Barnstaple.

(a) 4 T. R. 177.

(b) 2 B. & C. 724.

(c) 4 M. & S. 357.

(d) Burr. S. C. 412.

1851.

The King
against
The Inhabit-
ants of
Badby.

ter's settlement followed that of her father, which was in *Badby*. She was removable, therefore, to *Badby*.

BARON J. The sessions, by quashing the order of removal, both as to the mother and the daughter, have virtually decided that the child was within the age of nurture, and, therefore, not removable from her mother. There is no ground for reversing the order of sessions in that respect. As to the principal point, the question is not as to the place where the wife is settled; that, without doubt, is in her husband's parish, *Badby*. This is a case in which the party gets her own estate, of which she has a seisin. The husband had no sole seisin, for when an estate in fee comes to a feme covert, the interest of the husband and wife is a seisin in fee both in right of the wife. *Poyland v. Hawkins* (a). *Re v. Aythorpe Rooding* (b) is not so strong a case as the present: there the property was the husband's, while here it is the property of the wife, descendible to her heirs. There is no distinction between a sole occupation and an occupation in coparcenary. Although no partition had been made, the wife had a right to say that she would occupy her part, and not suffer other persons to occupy it. And there might be a good reason for it here, as by the husband's absence abroad it might have been difficult for her to collect the profits without residence. The pauper, therefore, was irremovable, though she could not have gained any settlement by her residence in *Broughton*.

HONORABLE AND LEARNED JES. concurred. Order of sessions confirmed.

(a) Doug. 529.

(b) Burr. S. C. 412.

1822

OF THE
COURT
OF COMMONS
IN THE
EIGHTH YEAR
OF GEORGE IV.

**The King against The Inhabitants of
HERSTMONCEAUX.**

UPON appeal against an order of two justices, whereby *J. Start*, his wife, and children, were removed from the parish of *All Saints, Hastings*, in the county of *Sussex*, to the parish of *Herstmonceaux*, in the same county; the sessions quashed the order as to the eldest daughter, she being illegitimate, and confirmed it as to the other paupers, subject to the opinion of this Court on the following case:—

On the 26th December 1825, the pauper, *J. Start*, being then settled at *Herstmonceaux*, agreed with *John Byster* to take a house in the parish of *All Saints, Hastings*, at twenty guineas a year; the rent to be paid weekly, and either party to be at liberty to give three months' notice from any quarter-day, and at the expiration thereof to determine the tenancy. The pauper continued above a year in the occupation of the premises, and paid a full year's rent. The case was argued on the first day of these sittings, by

In December 1825 a house was hired at twenty guineas a year, the rent to be paid weekly, and either landlord or tenant to be at liberty to determine the tenancy at three months' notice from any quarter-day: Held, that this was a renting of a tenement for one whole year, within the meaning of the stat. 6 G. 4. c. 57., and that the pauper, having occupied the same, and paid the rent for a year, gained a settlement.

Long and *Capron* in support of the order of sessions. The pauper gained no settlement in *All Saints, Hastings*, by renting this tenement. First, the parties at the time of the agreement did not intend that it should continue for a year; secondly, if they did, it was only a defeasible interest determinable by either party upon three months' notice, and so does not satisfy the statute. The 6 G. 4. c. 57. requires, inter alia, that the tenement shall be bona fide rented for the term of one whole year. The

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object of this statute, as of the prior statute (the 22 G. 3. c. 50), which it repeals, was to simplify the mode of gaining settlements by the renting of tenements; it should, therefore, receive such a construction as will best effectuate the intention of the legislature. And construing the words, "bona fide rented for the term of one whole year," with reference to the object of the legislature, the fair meaning of them is, that at the time of taking the tenement there should be a contract absolutely binding one party to part with, and the other to retain, the possession of the premises for one whole year. If that be so, then in this case there was no contract by which the landlord was bound to give up the premises, or by which the tenant was bound to keep them for one whole year, for either party might determine the tenancy by three months' notice. It is said that under the contract made in this case, the tenancy might endure for a year, and in fact did so. The agreement to let the house at twenty guineas a year imports only at the rate of twenty guineas, and therefore it did not follow necessarily from this contract that the house should be held for a year. The tenant might hold for half a year only; for the tenancy was to be determined by three months' notice expiring at any quarter-day. The tenant therefore took the same interest in the premises as if in terms it had been a quarterly tenancy. If a settlement was gained in this case, the consequence will follow, that a renting by the year, determinable at a week's notice, will also gain a settlement. So that a settlement may be gained in a case where the parties to the contract are bound for one week only. The legislature by this, as well as other statutes relating to the poor, viz. 13 & 14 Car. 2. c. 12 and 22 G. 3. c. 50., intended that settlements should be

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agreed to take the house in *December 1825*, after the passing of the 6 G. 4., and having complied with the other requisites, if there was a renting for a whole year; he clearly gained a settlement. This act repeals the 59 G. 3. c. 50. and then enacts, "that no person shall acquire a settlement by renting a tenement, unless it consist of a separate dwelling-house or land, bona fide rented for the sum of 10*l.* a year at the least for the term of one whole year, nor unless it shall be occupied under such yearly hiring, and the rent for the same actually paid." There is nothing in the preamble of the 6 G. 4. c. 57., or of the 59 G. 3. c. 50. which shews that it was in the contemplation of the legislature to require more than what would constitute in ordinary cases a tenancy for a year. The preamble of the 59 G. 3. recites nothing more than that many disputes and controversies had arisen respecting the settlement of poor people in parishes in *England* by the renting of tenements. The 6 G. 4. begins by reciting, that "whereas the settlement of the poor has been made in some instances to depend upon the annual value of tenements which they may have rented, &c. &c. and whereas the ascertaining such value in such cases has given rise to very expensive litigation," &c. and then repeals the act 59 G. 3. There is no recital in either, that any inconvenience had arisen where the tenancy by the original hiring was defeasible. There is nothing to shew that the words, "for one whole year," in the 6 G. 4. require a different agreement from that which is necessary in common cases to constitute a yearly taking. Is then "a taking at twenty guineas a year," the rent to be paid weekly, and either party to be at liberty to give three months' notice from any quarter-day, and at the expiration thereof to determine the tenancy,"

tenancy;" to be considered "a *bonâ fide* renting of a tenement for the term of one whole year?" A taking at an annual rent, though the rent is to be paid weekly, is *primâ facie* a yearly tenancy; if there had been no proviso about quitting at three months' notice, there could have been no doubt on the subject, as it would then have been an ordinary yearly tenancy, with the rent to be paid weekly instead of quarterly or half yearly. What, then, is the legal effect of a tenancy for a year, with a proviso for determining it in the middle of the year? Such a proviso does not prevent it from being a yearly tenancy: when the party is *in*, he is *in* of the whole estate for a year, liable to a defeasance on a particular event. In all cases of defeasible estates, when the party enters, he is *in* of the whole estate, though an event may afterwards occur which would prevent the estate from continuing during the whole period of time contemplated in the original grant of it. As where there is a lease for twenty-one years, determinable at the end of seven or fourteen years, the party, when he enters, is *in* of a term of twenty-one years, but a defeasible term, and which may terminate by matter *ex post facto*. So in the case of a common lease, with proviso for its defeasance by non-payment of rent, non-performance of covenants, or the like, the party enters for the whole term, liable to be defeated by a future event. Lord Coke, 1 *Inst.* 42 *a.*, puts several cases of defeasible estates: "If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quandiu se bene gesserit*, &c., in all these cases the lessee hath in judgment of law an estate for life determinable, and in pleading shall allege the lease, and conclude that by force thereof he was seised generally for term

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of his life." This is on the principle that when an interest is granted to him, liable to be determined on a particular event, the whole interest is vested in him in the first instance, but it may be taken out of him by the occurrence of that event. On the same principle *Buller J.*, speaking of the effect of a lease from year to year in *Birch v. Wright* (a), says: "If a tenant from year to year holds for four or five years, either he or his landlord, at the expiration of that time, may declare on the demise as having been made for such a number of years." This is on the principle that it is to be considered a lease for so many years as the party shall occupy, unless in the mean time it shall be defeated by notice on the one side or on the other. On the like principle, in this case the taking by the pauper is to be considered a lease for one whole year, in its creation, although an event might happen by which the original interest so created in the first instance would be changed. The event did not happen: he occupied the house for a whole year, and paid the rent, which exceeded 10*l.* during the same period. He, therefore, gained a settlement in *All Saints, Hastings*, and the order of sessions must be quashed.

Order of sessions quashed (b).

(a) 1 T. R. 378.

(b) The decision in this case is precisely within the principle laid down in *For v. Ryer*, 2 B. & C. 120., as to conditional hirings of servants. "If the bargain be originally made for an entire year, and terms are introduced applicable to a continuance of the relation of master and servant (landlord and tenant), during the whole year, but there is also a provision that in a given event it shall be competent to the parties to give an end to or suspend the service (tenancy) for a part of the year, still a settlement is gained if the service is actually performed (tenancy actually exists) for a whole year, and neither party avails himself of the condition. A conditional hiring (renting) is for this purpose the same as an absolute hiring (renting), unless the condition is acted upon."

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The King against The Inhabitants of
SANDHURST.

Saturday,
November 23.

UPON appeal against an order of two justices, whereby T. Stark, his wife, and children, were removed from the parish of Easthamsted to the parish of Sandhurst, both in the county of Berks, the sessions reconsidered the order, subject to the opinion of this court on the following case:—

The pauper, T. Stark, being unmarried, and without any child, was hired on the 18th of May 1825, as a servant on the establishment of the Royal Military College at Blackwater, in the parish of Sandhurst. By warrant under the hand of his late Majesty, bearing date the 27th May 1808, all matters relating to the interior regulations and economy of the establishment were placed under the cognizance of a collegiate board, consisting of the governor and several other persons mentioned in the warrant. Certain regulations for men-servants hired for the Royal Military College are embodied in a book kept for that purpose, containing, among other rules, the following: "The servants are to obey all orders they may receive from the officers of the institution, the staff-serjeants, and the surveyor. They are allowed wages at the rate of sixteen shillings per week, with one dress and one undress suit of clothes per annum, subject to such stoppages as may be ordered, but which shall be paid up every three months, after

A pauper was hired by the commanding officer of a royal military college to act as a servant in that establishment. By the terms of the hiring, he was to obey all orders of the officers of the institution, and to be allowed weekly wages, and if he wished to quit the college, he was to give one month's notice; but should the college be dissatisfied with his conduct, it retained the power of dismissing him at a moment's notice: Held, first, that this was a good hiring for a year, although either party might determine it before the expiration of the year; secondly, that a settlement was gained by such hiring, although it was not to a private person, the statute

only requiring a lawful hiring, and a service under it.

deducting

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deducting for the charge of breaking furniture, crockery, &c. belonging to the college, that may have been committed during that period. Should a servant wish to quit the college, he must give one month's previous notice; but should the college see reason to be dissatisfied with his conduct, it retains the power of dismissing him at a moment's notice." The customary mode of hiring such servants was by reading the rules over to them at the time of hiring, and then requiring their signature to them, in witness of their agreement to serve on the terms prescribed. The pauper was hired by Colonel *Butler*, the lieutenant-governor, one of the officers constituting the collegiate board, by whom the servants were usually hired. He heard the above regulations read at the same time by the quarter-master, and signified his assent in the usual manner, by subscribing his mark to them. He remained in the service, and received his wages as above agreed on, for two years and a half before he married. He lived and slept in the body of the college, and was employed in making the beds of the gentlemen cadets, assisting in sweeping and cleaning the rooms, and various other occupations for the service of the college exclusively, as directed by the officers of the college. He was discharged with several other public servants of the college, without notice, in the year 1819, on a reduction of the establishment by order of government. The body of the college is exclusively appropriated to public uses for study and lodging of the gentlemen cadets, and is exempt from poor-rates, as being a public building. The pauper and thirty-two other persons were employed in the same service, not as the private servants of any individual, but as the public servants of the establishment, to obey generally the officers of the college:

college: and they were paid by the pay-serjeant, out of the funds supplied for the maintenance of the college; and they were not returned to the collector of the taxes, nor paid for, nor assessed as servants. The pauper, *T. Slark*, afterwards married his present wife, and the children removed with him are the issue of the marriage. Upon these facts, the sessions found that there was a general hiring sufficient to confer a settlement, if a settlement could be acquired by such hiring and service in a public establishment like the college; and submitted this question for the opinion of this Court, Whether the pauper, *T. Slark*, acquired a settlement by such hiring and service in the college? This case was argued at the sittings in banc after last *Trinity* term.

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Shepherd and *Talfourd* in support of the order of sessions. This was a yearly hiring, and as the college did not exercise the power of dismissing the pauper, he gained a settlement at the end of his first year's service. Besides, the sessions find expressly a general hiring, and only ask the opinion of the Court on the effect of "such general hiring and service." It is immaterial whether the contract be to serve one or more masters, as the statute 3 *W. & M. c. 11. s. 7.* does not mention any person as master to whom the hiring is to be; but only enacts that the person in order to gain a settlement shall be unmarried, without child or children, and shall serve under a lawful hiring for a year. It is the nature of the service, therefore, that must determine the settlement. There is no reported case in which a servant of his Majesty has gained a settlement by such service; but that may be because such right was never disputed.

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disputed. By the statute 52 G. 3. c. 72. s. 2, enacted for the enclosure of the *New Forest*, the servants of the crown are expressly excluded from gaining a settlement, and it may, therefore, reasonably be inferred that, without such a disability by statute, they would have gained a settlement by such service.

The Solicitor-General, Nolan, and Stone, contra. If, the facts in a case shew that the sessions have decided, on wrong grounds, the Court is not limited by the return of the justices; and the reason is, that the case, when returned by the certiorari becomes part of the records of the Court; and as the Court will enforce obedience to any decision which they come to, they will take care that the record will lawfully enable them. First, there is no yearly hiring within the statute. An unilateral contract is not sufficient; it must be reciprocal. Supposing the contract on the part of the servant to be a general hiring, yet the power retained by the college of dismissing him at a moment's notice, should they see reason to be dissatisfied with him, is parcel of the original contract, and is inconsistent with the notion of a yearly hiring. He was in fact discharged at a moment's notice, not for any fault, but on the reduction of the establishment, which explains how wide a meaning was given to the word "dissatisfaction" by both parties at the time of hiring. Besides, it is an exceptive hiring: the terms of the engagement were read to the pauper at the time of hiring, and the persons hiring cannot go beyond these; so that when he had done his work, he was for the rest of the day *sui juris*. Secondly, from the nature of the establishment, a service in it will not confer a settlement. It was intended by the statute

§ 57. c. 30. & 4., that persons gaining a settlement should have benefitted the parish for one whole year, but the establishment where the service was performed pays no rates, and if it could confer settlements it would impose burthens on the parish without contributing to their support. The statute 52 G. 3. c. 124. which vests in the crown certain lands for the Royal Military College, recites that his majesty had been pleased to establish a royal military college, and had directed that certain persons should form a collegiate board for the control of the interior regulations of such establishment; the persons in the establishment are, therefore, the servants of the crown, though hired by the officers of the establishment, and the crown not being mentioned in the act of *William* is not subject to its operation, and its servants cannot gain a settlement. Indeed this is more like an office than a service, and the person serving, like a soldier, who is the servant of the king, and may be dismissed at the discretion of the crown, and receives pay from the public purse, not from the pocket of any individual. No declaration could be framed in which such servant could bring an action against any of the officers for being turned away on the reduction of the establishment.

Cur. adv. vult.

HAYLEY J. on this day delivered the judgment of the Court. In this case the question is, Whether the *paper* had acquired a settlement in consequence of having been hired into the establishment at *Sandhurst*, and having served there for a year. That establishment is in the nature of a collegiate board, and the terms on which the servants are hired are, that "they are to obey

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all orders they may receive from the officers of the institution." They are allowed at the rate of 16s. per week, with one dress, &c., per annum, subject to such stoppages as may be ordered, but which are to be paid up every three months, after deducting for the charge of breaking furniture, &c.; and should a servant wish to quit the college, he must give one month's previous notice, but should the college see reason to be dissatisfied with his conduct, it retains the power of dismissing him at a moment's notice. The sessions thought that this was a general hiring so as to constitute a hiring for a year; but they entertained a doubt whether the hiring, being by the officer of the establishment, was sufficient to confer a settlement on the individual hired. Another point raised in the discussion was, whether the power reserved in the original contract of putting an end to the service by a month's notice on the part of the servant, or at a moment's notice by the College, should they be dissatisfied with him, prevented this from being a hiring for a year. On this point we are satisfied that this is to be deemed a yearly hiring, notwithstanding the power of determining it in the meantime, as that power was not exercised before the expiration of the year. It is like the case of a defeasible contract, (similar to that in *Rex v. Herstmonceux* (a),) to be determined on some contingency; but that contingency not having happened, and the contract not having been defeated during the year, it endures after the year's service as a yearly hiring. But it was also said, that as the hiring was by the officer of the establishment, and as the party was to serve the officers of the establishment, and

(a) *Antw. p. 261.*

the young gentlemen supported at it, and was not hired by, or to serve a private individual, that distinguished this from the ordinary cases of hiring, and prevented a settlement from being gained. The stat. 3 W. & M. c. 11. s. 7. only contemplates a lawful hiring and service under it; it does not say by whom the hiring is to be made. It has been urged in argument, that the party is to be considered as holding an office, not as a servant. But a man who does all the menial offices of a servant, and is at the command of the persons in the establishment, is a servant, and not an officer. We think that the legislature did not mean to make any distinction between one description of hiring and another, by a particular description of persons; all that it required was, that the hiring should be lawful, and that there should be a service under it. Here there was a lawful hiring and a service under it in the parish of Sandhurst, and, therefore, a settlement was gained.

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Order of sessions confirmed.

The King against The Inhabitants of STOKES

DAMEREL.

UPON appeal against an order of two justices, whereby Jane Coleman was removed from the parish of Stoke Damerel to the parish of Charles, in the

The 56 G. 3.
c. 139. s. 11.
recited, that the
salutary provisions
enacted
by the 43 Eliz.

was frequently abused, in the binding out of poor children; and that the premium of apprenticeship was clandestinely provided by parish officers, who were thus enabled to bind out poor children without the sanction of justices of the peace, and then exacted, "That no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by any public parochial funds, shall be valid and effectual, unless approved by two justices of the peace under their hands and seals, according to the provisions of the said act and of this act:" Held, that in order to make an indenture by reason of which any expense had been incurred by the public parochial funds valid and effectual, the approval of two justices should be under their hands and seals, and that such an indenture, approved of by two justices under their hands only, was void and not voidable, and that no settlement was gained by serving under it.

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borough of *Plymouth*, both in the county of *Devon*; the sessions quashed the order, subject to the opinion of this Court, on the following case:—

The pauper, *Jane Coleman*, daughter of *Thomas Coleman*, of the parish of *Stoke Damerel*, in the county of *Devon*, was bound an apprentice on the 16th October 1823, to *Jeremiah Ellis*, of the parish of *Charles*, within the borough of *Plymouth*, in the said county. The indenture, which was on a 1*l.* stamp, was executed by the master, the pauper, and her father, but not by the overseers of the poor of the parish of *Stoke Damerel* (who were not parties thereto) and the following allowance was written on the margin of the same:—“*Devon to wit; We, whose names are hereunder written, justices of the peace for the county aforesaid, whereof one is of the quorum, do consent and allow to the putting forth Jane Coleman an apprentice, according to the intent and meaning of the said indenture.*” This allowance was signed by *E. Lockyer* and *S. Pym*, two justices of the peace for the county of *Devon*, but was not under their seals. Upon the binding of *Jane Coleman* by the indenture, an expence was incurred by the public parochial funds of *Stoke Damerel* (i. e.) the sum of 9*l.*, being the consideration-money mentioned in the indenture; and a further sum, being the costs and charges attending the binding. No notice was given to the overseers of the poor of the parish of *Charles*, (or to the guardians of the poor of *Plymouth*, or to any of them, of the intention to bind out such apprentice) previous to the binding. *Plymouth* is a borough, situate in the county of *Devon*, having justices, who have exclusive jurisdiction therein. The pauper resided in service under this indenture with *Ellis*, in the parish of *Charles, Plymouth*, from the date of the indenture

indenture until she was discharged from further service under it, on the 3d July 1826, by two magistrates.

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Nolan and Praed in support of the order of sessions.

No settlement was gained in *Charles* by the service under this indenture. The pauper would have gained a settlement by such service, if the binding was valid either as a parish indenture or as a binding between the parties. But it cannot be good as a binding by the parish, because the parish officers were no parties to the deed. *Rex v. Arundel (a)* shews that this is a good binding between the parties, unless it be void by reason of non-compliance with some of the provisions of the statute 56 G. 3. c. 139. The early sections of that statute relate to indentures where the parish officers are parties; and the second section requires that notice shall be given to the overseers of the poor of the parish in which such child shall be intended to serve an apprenticeship, before any justice shall allow such indenture. *Rex v. Newark-upon-Trent (b)* shews that such notice is necessary in the case of parish apprentices. The eleventh section, after reciting that the salutary provisions enacted by the 43 *Elix.* are frequently evaded in the binding out of poor children, and that the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of the justices of peace, enacts, "that no indenture of apprenticeship, by reason of which any expence whatever shall at any time be in-

(a) 5 M. & S. 257.

(b) 5 B. & C. 59.

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ington.

curring by the public parochial funds, shall be valid and effectual, unless approved of by two justices of the peace under their hands and seals, according to the provisions of the said act and of this act. One of the provisions of that act is, that notice shall be given to the overseers of the poor of the parish in which such child shall be intended to serve an apprenticeship. That regulation therefore must be considered as incorporated in the eleventh section; and the indenture in question is not valid for want of such notice. Secondly, the indenture was void, because the approval by the two justices was not under their seals. This is a power given to the justices which is to bind third persons, and the affixing of their seals is a condition annexed by the legislature to the execution of the power, and the justices therefore cannot dispense with it. The allowance of parish indentures and of certificates are analogous to each other. Now, by the 8 & 9 W. 3. c. 30. persons coming to inhabit, and bringing with them a certificate under the hands and seals of the churchwardens and overseers of the poor of any parish, owning them to be inhabitants of such other parish, are irremovable until actually chargeable. It was decided, in *Rex v. Austrey* (a), not only that there must be a seal to such certificate, but that there must be a separate seal for each party granting the certificate, and that upon the ground that it was the mere case of the execution of a power, and that all the circumstances required by the creators of the power, however unessential and otherwise unimportant, could only be satisfied by a strictly literal and precise performance.

(a) *Phill. Ev.* 471. seventh edition.

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Act.

Holland and Coleridge contra. The eleventh section does not incorporate all the provisions of the previous sections, but is a distinct enactment, applicable to a particular species of apprenticeship, where the parish officers are not parties to the indenture, but where some part of the expense is paid out of the parochial funds. It has a preamble of its own, and was evidently introduced for the purpose of preventing the parish funds from being improperly appropriated by the overseers. Then as to the sealing, the act is only directory. By the 43 Eliz. c. 2, s. 5, the parish officers, by the assent of two justices, are authorised to bind poor children apprentices; but such assent is not required to be given under seal. In the very same section, the overseers of the poor are empowered to treat with lords of manors for waste land for the erection of cottages, and the agreement must be under the hand and seal of the lord of the manor. So, in the first section of the act 56 G. 3. c. 139., the justices are required to sign the allowance of the indenture where the parish officers are parties, and no greater power is given to the justices by the eleventh section than the first. Why, therefore, should a greater degree of solemnity be required in the acts required to be done by them under the eleventh section than under the first? *Rex v. Austrey* (a) does not apply, because a certificate is the act of the parish officers, and the sealing is indispensable to make it valid. Here, the indenture was a complete instrument before the approval of the magistrates. By statute 5 Eliz. c. 4. s. 41. it is enacted, "that all indentures made otherwise than is by that statute appointed, shall

(a) *Phill. Ev.* 471. seventh edition.

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mercifully settling all intents and purp[ur]s that the
word void is not to be taken in a strict and literal
sense, but in a sense which shall be most reasonable and
conformable to the intention of the legislature, as in *Rees v. St. Nicholas
Hospital* (d) 20 Gray 400. *Cooper v. Cooper* (e) 10 Q. B. 100. And
the test, whether such instrument is void or voidable, is
not to be the imposition or omission of a penalty for
not complying, but according to the provisions of the
act. In this case there is no penalty, and, therefore,
according to the rule laid down, this indenture is not
void, but voidable only. The eleventh section of the
act says, that the indenture shall not be void unless
approved of by the justices in the manner pointed out;
but that may mean, that it shall not be void between
the parties, so as to enable a master to compel the com-
pletion of the service, or to proceed on any of the saved
clauses. In *Rees v. St. Nicholas Hospital* Lord Almon-
bury was of opinion, that the forty-first section of the 5th Geo.
4. did not make the indentures void, but voidable by
the parties themselves only. The settlement of paupers
is not the subject-matter of the statute 56 G. 3. c. 156,
it is for the binding of parish apprentices. But where
the legislature intended to take away settlements, it has
done so in express terms, as in sections 5 and 6 of the
section 11, settlements are not mentioned. No bind of
the law of the land. *Rees v. St. Nicholas Hospital* (d) 20 Gray 400.
BARRY J. I do not know how to get rid of the
words of this section of the act of parliament, and where
the legislature in a very modern act of parliament have
used words of a plain and definite import, it is very
dangerous to put upon them a construction, the effect
of which would be to render the act void. *Rees v. St. Nicholas Hospital* (d) 20 Gray 400.
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ington.

in within the spirit, and the words of the act, and the indenture not having been approved of by the justices, under their hands, and seals, is not valid and effectual. The words, "according to the provisions of the said act and of this act," reddendo singula singulis, mean that there shall be such approbation by the justices as the 43 Eliz. and the 56 G. 3. c. 139 require. Now the latter statute requires that the indenture shall be approved of by the justices under their seals. I cannot tell why the legislature required that the indenture should be approved of under their seals; but they have so required it in express terms, and I cannot say that they did not mean that which they have so expressed. It has been contended, that the words *not valid and effectual* are to be construed so as to make the indentures not absolutely void, but voidable only at the option of either party; and that, therefore, the indentures will not be void and effectual if either party dissent during the period of apprenticeship, but that if there be no such dissent, they will be valid and effectual. I think it was the intention of the legislature that there should be such an allowance by the justices, in the first instance, as to make the indenture binding ab initio, and not voidable at the option of either party. For otherwise it would be at the option of the master (or) of the apprentice to determine the indentures at any period within the seven years. The master might, therefore, after six years and three quarters service, at his own election, deprive the apprentice of the benefit of his indentures; on the apprentice, on the other hand, might after he had received instruction sufficient to enable him to set for himself, also determine the indentures to the prejudice of his master. I think that that would be an unreasonable

unreasonable construction to be put on those words, and that the true construction of them is, that the indentures shall be void ab initio, unless they have the approbation of the justices under their hands and seals.

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St. George's
New Town.

HOLROYD J. I think that this was not a binding by the parish officers, within the early sections of the statute, but that it was a binding within the meaning of section 41. That section enacts, not merely that no parish indenture, but that no indenture shall be valid and effectual unless it has the approbation of two justices under their hands and seals. It has been argued, that it is not requisite that the approbation of the justices should be under their hands and seals, but that these things shall be done which are required by the statute of the 43 Eliz. and by the earlier sections of this act; and that they not requiring that the allowance of the justices shall be under their seals, the words "under their hands and seals," are to be qualified by the latter words, "according to the provisions of the said act and of this act." It seems to me that the true construction of those words is, that the approval shall be such as is required by the 43d of Eliz., and by the former sections of the 58 G. 3. c. 136., and shall also be under the hands and seals of the justices. Then, it has been contended, that the words "not valid and effectual," may be construed to make the indenture voidable only; upon that point I have entertained some doubt. But it is admitted, that it was competent to either party to avoid such an indenture before the service expired. Now, here it was avoided, for the pauper was discharged from her service by an order of two magistrates. Assuming that the indentures

1837.

*The King
vs. The Inhabit-
ants of
St. Mary's
Parish*

Indentures were voidable only, still, as they were avoided, no settlement could be gained. As to the question, whether the indentures were absolutely void or voidable only, it is to be observed, that this statute says not merely, that they shall not be valid, but that they shall not be valid and effectual. The case, therefore, is different from others, where it has been held, in order to prevent mischief, that the word void shall be construed available. But, without deciding that point, I think that as the indenture was avoided by the parties, it was thereby rendered not valid and effectual, and that no settlement was gained by the service under it.

JURIST DARE J. No settlement was gained by the service under this indenture. The law undoubtedly makes a difference between instruments under seal and those which are not, and regards the former as acts done with more solemnity; and the legislature may have required the justices to allow the indentures under seal, in order to make them treat the act of allowance as a matter of importance. It has been argued, that the words "and seals," are directory. I think they are not, for you must take the whole section together. It is quite clear that the whole is not directory, and one part cannot be directory if the whole is not so. It is argued that this indenture, though it may not be effectual for all purposes, is sufficient for the purpose of enabling the pauper to gain a settlement. That is a consequence resulting from serving under a valid indenture of apprenticeship. Here the act of parliament says, that no indenture of apprenticeship shall be valid and effectual, unless approved of by the justices under their hands and seals, and that being so, the allowance not having been under

the terms of the indenture, this indenture was not valid and effect, and all the consequences which would otherwise have resulted from it are prevented; and the service under it did not confer a settlement. In the fifth section it was necessary to take away the power of gaining a settlement in express terms, as the provisions are affirmative; but in section 110 they are negative; and, therefore, that was not necessary. If the indenture is destroyed by the enactment, that it shall not be valid unless approved by the justices under their hands and seals, there was no necessity for a special enactment, that no settlement should be gained by service under it.

Order of sessions confirmed.

The King against The Inhabitants of WHITCHURCH.

UPON appeal against an order of two justices, whereby they removed *W. Bray* the younger, his wife and children, from the parish of *Whitchurch*, in the county of *Southampton*, to the parish of *Saint Mary Bourne* in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The sessions for the year 1758 were nominated at Easter, and were proved to have been sworn into office on the 15th of September, at the visitation. But there was no direct evidence of this having been sworn into office before that time. The preceding parish, after the date of the certificate, had frequently relieved the pauper and different members of his family while they were residing in the parish. Held, that in absence of such direct evidence, which had been treated by the certifying parish as valid, the Court would presume that the churchwarden presented the certificate to the sessions before he executed it. And, moreover, that it was duly executed by him as churchwarden: Held, secondly, that the execution by two overseers and two churchwardens is not essential to the validity of such certificates and overseers within the statute 8 & 9 W. 3. c. 30.

1757.

THE KING
against
The Inhabitants
of
Whitchurch
and
Saint Mary
Bourne.

A parish certificate, dated the 7th of September 1758, purported, in the body of it, to have been granted to a pauper and his family by two churchwardens and two overseers. It was signed and

1821

The Bland
against
The Inhabitants
of
Whitchurch.

The following certificate was produced on the part of the parish of *Whitchurch* in the county of *Southampton* to wit: We, *John Harbutt, William Piper, William Arundel, William Philpott*, churchwardens and overseers of the poor of the parish of *Saint Mary Bourne*, in the county aforesaid, do hereby own and acknowledge *William Bray* junior, and *Elizabeth* his wife, *William*, aged about five years, *Mary*, aged about three years, and *Elizabeth*, aged about two years, their children, to be our inhabitants, legally settled in the said parish of *Saint Mary Bourne*. In witness whereof, we have hereunto set our hands and seals this 7th day of *September 1758*."

The instrument was signed by *W. Piper*, as one of the churchwardens, and by *W. Arundel* and *W. Philpott*, the two overseers, and attested by two witnesses, and was duly allowed by two justices on the 12th *September 1758*, who certified that *Alexander Neave*, one of the witnesses who attended the execution of the certificate, had made oath before them that he saw the churchwardens and overseers of the said parish, whose hands and seals were subscribed and set to the certificate, severally sign and seal the same, and the names of the said *Alexander Neave* and *Thomas May*, whose hands were subscribed as witnesses to the execution of the certificate, were of their own proper handwriting respectively.

Richard Loft produced the certificate from the parish chest of *Whitchurch*, which was admitted as coming from the proper place. It was proved that *William Bray* junior, the grandfather of the pauper, resided in *Whitchurch* till the time of his death in 1759, that *W. Bray*, his son, also named in the certificate, had resided there ever since the certificate was granted, and that the pauper resided there from the time of his birth

birth until the time of his removal under the orders. It appeared by the visitation-books produced by the registrar of the bishop's court, that *Saint Mary Bourne* is in the diocese of *Winchester*, and is a peculiar in the jurisdiction of the Chancellor's visitation; that *John Harbutt* and *William Piper* were sworn churchwardens for *Saint Mary Bourne* in the year 1758, on the 14th September in that year; that no churchwardens appeared by the books to have been sworn in at the visitation from the year 1751 to 1758; that the visitation-book for 1750 was lost. It also appeared from the evidence of the registrar, that it was the course of office to make an entry in the visitation-books of the swearing in of churchwardens at the time of swearing, whether the swearing took place at the visitation or afterwards; that if it took place afterwards, the registrar always entered it, but he had not looked over the books before his time to see whether there were any entries of such subsequent swearing. It appeared that at *Easter* 1750, *J. Longman* was nominated as churchwarden; that in 1757, *J. Cowdery* and *E. Rattin* were nominated churchwardens, and that *John Harbutt* signed the nomination; that at *Easter* in 1758, *Thomas Harbutt* and *W. Piper* were nominated churchwardens. It appeared also that *W. Bray*, the pauper, was, on the 7th December 1790, bound by indenture to his grandfather *W. Bray* junior, named in the certificate, for the term of seven years, which time he served in *Witchchurch*; and that the pauper had done no act since the service under the apprenticeship to gain a settlement. It appeared that *W. Bray* (son of *W. Bray* junior, mentioned in the certificate), the father of the pauper, sixteen or seventeen years ago, received relief from the overseers of *St. Mary Bourne*, and

1803

The United
The United
The United
The United
The United

1887.

~~The King
v. The
Churchwardens
of the Parish of
St. Martin in
the City of
London~~

persons had been appointed. The distinction between a churchwarden *de facto* and *de jure*, is recognised in *Vin. Abr.* tit. *Churchwardens*, A. 2, pl. 13. "If there be a churchwarden *de jure* and a churchwarden *de facto* in the same parish, this latter cannot justify the laying out of or receiving money, but he is not accountable to the churchwarden *de jure*; he is no more than another man, (per *Powell* and *Powis*, Justices) and he that is *de jure* may bring *indebitatus assumpsit* against the other." The 54 G. 3. c. 187., which enacts, that where churchwardens of a parish have granted certificates from townships within it, such certificates shall be good, though they have not been sworn in for the township, requires, as a condition precedent, that they shall have been duly sworn in as churchwardens of the parish. The certificate is bad upon the face of it, because it professes to be the certificate of four persons, whereas it is signed only by one churchwarden and two overseers, and, therefore, it is not properly executed. It is not like a deed, binding on the parties executing, but it is a corporate act of the parish officers, and should be signed by all. The cases of *Rex v. Catesby* (a), which arose on the certificate act, and *Rex v. Hinchley* (b), and *Rex v. Earl Shilton* (c), which arose on the acts for binding poor children apprentices, may be cited in answer. In those cases only one churchwarden and one overseer were parties to the certificate and the indentures. But all the persons who purported to grant the certificate, or join in the indentures, duly executed them, and being well executed *prima facie*, the court, in order

(a) 2 B. & C. 814.

(b) 12 East, 561.

(c) 1 B. & A. 375.

1807.

THE KING
v. THE
CHURCHWARDENS
OF
ST. MARGARET, LEICESTER.

last certificate (a); however, in the issue of which being
by churchwardens, the certificate must be signed by the
heads and tails of the quorum, i. e. all of them. But,
secondly, the certificate is bad, because the persons who
are described in the body of it as churchwardens, were
not at the time of its execution or allowance by the
magistrates, churchwardens de jure. They had at that
time been appointed, but they were not sworn in until
the 15th of September. Now it is a principle of law
that persons appointed to an office, are not completely
in office until they are sworn. Mayors, constables,
and annual officers, are good officers after the year for
which they are elected or appointed to serve is expired,
until their successors are sworn in, per King C. J. in
King v. Pinner (b). The churchwardens of the pre-
ceding year must, therefore, be considered as in office
until the 15th of September, when their successors were
sworn in; and Pinner, who signed the certificate in this
case, was not, in point of law churchwarden before
he was sworn in; for otherwise there would have
been two sets of persons at the same time capable of
giving certificates. This is consistent with the eccle-
siastical law, for by Canon 118, the office of all church-
wardens and side-men shall be reputed to continue
until the new churchwardens that succeed them be
sworn in. The records of the ecclesiastical court exclude
any presumption that these persons were churchwardens
in the previous year, and continued in office until the
succeeding in of their successors, for it appears that other

(a) See *Rea v. St. Margaret, Leicester*, 8 East, 352. and *Rea v. Burton*,
5 T. R. 252.

(b) 1 An. 625.

1827.

The King
vs. The Inhabitants of
Warrington.

or of any right annexed to land, the law considers it to be rightful, and will, therefore, presume the existence of instruments of conveyance, and the observance of all acts necessary to make those instruments of conveyance valid; and in favour of a parish certificate it will be intended that it had a lawful beginning; and, accordingly, in *Rex v. Catesby* (a), the Court, in favour of a certificate sixty years old, presumed that an overseer, who if living ought to have signed and sealed the certificate, was dead at the time when it was granted. So in *Rex v. Long Buckley* (b), where an indenture above thirty years old was lost, although it was proved there was no entry that any such indenture had been stamped, yet this Court held, that in favour of such an ancient document, the sessions had properly presumed that it had an appropriate stamp. - Upon this principle, therefore, that the law presumes every thing to be rightly done, the Court, in favour of the validity of an instrument, will intend any state of facts under which it could by any possibility be valid. Now, it is not clearly established that a churchwarden must be sworn before he can act; in *Viner's Abr. tit. Churchwarden*, pl. 9, it is said that a churchwarden may execute his office before he is sworn in; and in *Rex v. Wymondham* (c) the Court held that a certificate signed by a majority of the parish officers de facto was valid; and they would not enquire into the title of those who signed the certificate. Now *Piper*, who signed the certificate in question, was clearly a churchwarden de facto. But assuming that a person elected churchwarden must be sworn into office before

(a) 1 B. & C. 140. (b) 1 B. & C. 140. (c) 5 T. R. 140.

he can act, still, if he continues to act after the expiration of the year, for which he was elected, there is a virtual assent of the parish to his continuance in the office, into which he had been admitted and sworn, and then it is unnecessary that he should be re-sworn. It is consistent with all the evidence in this case, that *Piper* may have been elected and sworn into office in 1750, or before that year, and that he may have continued in office by the tacit consent of the parishioners until 1758, when the certificate was granted. It is true that other persons were nominated churchwardens in the period intervening between 1750 and 1758, but they were not sworn in; there was no evidence, therefore, that they became churchwardens de jure, and if they did not, then *Piper* may have been the only churchwarden de jure at the time when the certificate was granted.

Barlow J. The question in this case is, Whether a certificate, granted nearly seventy years ago, is valid? By the instrument, four persons are described as churchwardens and overseers of the parish of *St. Mary Bourne*, but it appears, by the visitation books, that *Piper*, who signed the certificate as churchwarden, and *J. Harbutt*, who was described in it as the other churchwarden, were sworn in three days after the allowance of the certificate by the magistrates. It is contended, therefore, that as *Piper*, who signed the certificate, was not sworn into office at the time when it was executed, he was not churchwarden de jure, and that the certificate was not binding on the parish; and if that argument prevails, then, although a fraud was practised upon the churchwardens and

1837.

The King
against
The Inhabit-
ants of
Whitchurch.

1781
1787.The King
vs.
The Inhabitants
of
Whitchurch.

overseers of *Whitchurch*, to whom the certificate was granted, it will be competent to the parish by whom the fraud was committed, by shewing that those persons were not then sworn into office, to vacate the certificate, and say that it is not binding on the parish of *St. Mary Bourne*. If we were to hold that at any distance of time a certificate might be impeached on such grounds, the consequence would be that no parish officer in future would be safe in taking a certificate. A man may, with the knowledge, and by the permission of the parish, act, in point of fact, as churchwarden, before he is sworn into office; he may, therefore, be churchwarden *de facto*, while some other person may be churchwarden *de jure*. Now it would operate as a great encouragement to a parish to induce a man so to act before he is sworn in, and thereby enable him to practise a fraud by granting certificates, if we were to hold the certificate in this case to be void. At present I am strongly inclined to think, that the fact of a churchwarden not having been sworn in until a period subsequent to the date of the certificate, is not of itself sufficient in any case to avoid the certificate. But in this case, the parish of *St. Mary Bourne*, who must have known under what circumstances the certificate was granted, have, from the year 1758 to the time when the order of removal was made, treated the certificate as valid; for they have, from time to time, relieved the pauper, and different members of his family, while they were residing in the parish of *Whitchurch*. As against the parish of *St. Mary Bourne*, therefore, I think we are warranted in favour of the validity of this certificate to presume any circumstances under which it may have

been

been valid. Now an instance may be put, in which the certificate may, consistently with all the facts stated in the case, have been a valid certificate. Suppose *Piper*, soon after his nomination at *Easter* 1758, and before he did any act as churchwarden, to have gone to the commissary, and, to have been sworn into office before him. The commissary might afterwards have required both the churchwardens to be re-sworn at the time of the visitation, in order that the fact of their having been so sworn might appear in the books. If *Piper* alone was sworn into office before the visitation, he may have been the only churchwarden de jure at the time when the certificate was granted, and *Harbutt* may have declined to sign the certificate because he had not been sworn into office. I think it fair and reasonable, to make this presumption against the certifying parish, who, by their certificate, held out to the parish officers of *Whitchurch* that *Piper* and *Harbutt* filled the office of churchwardens. Unless we make such a presumption in favour of the validity of this certificate, we must presume that the parish of *Saint Mary Bourne* contemplated a fraud upon the parish of *Whitchurch*; but we ought not to presume fraud. On the contrary, we ought to make every presumption in favour of the validity of that act. I think, therefore, we ought to presume that *Piper* alone had been sworn into office at the time when he executed the certificate; that he was consequently the only churchwarden de jure, and that the certificate was a good certificate. It therefore becomes unnecessary to decide the question, whether a certificate signed and sealed by a churchwarden de facto is valid.

1807
The King
The Lord
The Lord of
Whitchurch

1857.
 The Church
 against
 The Inhabitants of
 Wymondley.

VERDICT: *For the defendant.* I think also that the certificate may be supported. Upon the question whether a churchwarden can lawfully do any act before he is actually sworn into office, I entertain some doubt. That matter was not fully discussed in the case cited from *Perini*. It is unnecessary, however, to decide that point, because here the certificate was granted nearly seventy years ago. Now sixty years bars a writ of right, and although the validity of certificates of that age may perhaps be enquired into, yet after such a lapse of time, and after the certificate has been acted upon and treated by the certifying parish as valid, we ought, upon the principle upon which courts of law act in making presumptions, to intend that *Piper* was actually sworn in at the time when he executed it. The real fact cannot now be ascertained. The persons who alone could have any knowledge upon the subject are either dead or have left the parish. The fact, therefore, not being capable of proof, it appears to me reasonable to presume, that individuals appointed to a public office would not act for six months without taking that oath which the law required them, and which it was their duty to take. It does not appear whether it was usual to hold visitations at the time when churchwardens were elected. From the year 1751 to 1758, there is not in the visitation-books any entry of churchwardens having been sworn in. I cannot presume that, during that period, the practice was not to swear the churchwardens into office. The reasonable presumption is, that the persons who were appointed churchwardens in those years went to the commissary, and were sworn in before him; and the fact of there being in the visitation-books no entry of the swearing in of the churchwardens during that period,

period, is consistent with this presumption, for it may have been thought unnecessary that they should be again sworn, in, at the visitation. I think, therefore, that in this case we ought, upon general principles, to intend that every thing necessary to be done to make this certificate valid was done; and, consequently, that we ought to intend that *Piper*, before he executed it, was sworn into office in the manner suggested by my Brother *Reley*, or even, if necessary, that *Piper* and *Hart* were appointed churchwardens and sworn into office in 1760, and that they continued to act as churchwardens at the time when the certificate was granted. But it was objected that it was not signed by all the churchwardens, although in the body of the instrument it is purported to be the act of all; but that is immaterial. The act of parliament only requires that the certificate shall be signed by the churchwardens and overseers, or the major part of them. The words "the major part of them," do not mean the major part of the overseers, but of the churchwardens and overseers taken as one aggregate body, and it is only necessary, therefore, that a majority of that aggregate body should concur in the act required to be done. The certificate in this case having been signed by three out of four, I think it is sufficient; and that being so, it is valid; and the order of sessions must, therefore, be quashed.

1781.
The King
against
The Inhabit-
ants of
Haverhill.

1827

By statute
17 G. 2. c. 3.
s. 2. it is en-
acted, "that
overseers of the
poor shall per-
mit inhabitants
of the parish to
inspect rates at
all reasonable
times;" and
by sect. 3., "if
any overseer
shall not per-
mit an inhabit-
ant to inspect
the rate, such
overseer, for
every such of-
fence, shall for-
feit and pay to
the party ag-
grieved the
sum of 20*l*."

By statute
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mit an inhabit-
ant to inspect
the rate, such
overseer, for
every such of-
fence, shall for-
feit and pay to
the party ag-
grieved the
sum of 20*l*."

Held, first, that
a demand to
inspect a rate
made on the
overseer by a
rated inhabit-
ant in the pre-
sence of his
attorney, was a
lawful demand.

Secondly,
that the refusal
to produce the
rate upon a
lawful demand,

constitutes the inhabitant a party grieved within the meaning of the statute.

Thirdly, that a notice that a rate of so much in the pound would be collected, together with a good publication of the rate, although it was not stated that it had been allowed by the justices.

Fourthly, that a demand to see "the rate" was sufficiently specific, there being only one rate in case at that time.

Fifthly, that the overseer, by refusing to shew the rate, and referring the party to the select vestry as a place where he would be allowed to inspect it, incurred the penalty imposed by the 17 G. 2. c. 3.

Sixthly, that an assistant overseer, appointed by a select vestry under the provisions of the 59 G. 3. c. 12. s. 2. is not liable to the penalties imposed by the 17 G. 2. c. 3. s. 3. upon overseers not permitting inhabitants to inspect the rate, unless it be proved that the select vestry have imposed upon such assistant overseer the duty of producing the rate to the inhabitants.

and publication of the rate and the possession of the defendant. There was a refusal to inspect the rate, and the defendant was not allowed to inspect the rate.

Bennett against Edwards.

The first count of the declaration stated that the plaintiff was an inhabitant of the parish of *Almondsbury*, in the county of *Gloucester*, and that the defendant was one of the overseers of the poor of that parish; that on the 1st March 1827, the churchwardens and overseers of the parish made a rate for the relief of the poor, which was afterwards allowed by two justices, and published by the churchwardens and overseers of the poor of the parish; and that afterwards, and at a reasonable time in that behalf to wit, on the 23d May 1827, the plaintiff requested the defendant, as such overseer, to permit him to inspect the rate, and tendered the defendant 2*l* for the same, and although the defendant, as such overseer, had the rate in his possession, yet he would not permit the plaintiff to inspect it, but refused, contrary to the form of the statute, whereby the defendant forfeited 20*l*.

DEBT on the statute 17 G. 2. c. 3. The first count

of the declaration stated that the plaintiff was an

inhabitant of the parish of *Almondsbury*, in the county

of *Gloucester*, and that the defendant was one of the

overseers of the poor of that parish; that on the 1st

March 1827, the churchwardens and overseers of the

parish made a rate for the relief of the poor, which was

afterwards allowed by two justices, and published by the

churchwardens and overseers of the poor of the parish;

and that afterwards, and at a reasonable time in that

behalf to wit, on the 23d May 1827, the plaintiff

requested the defendant, as such overseer, to permit him

to inspect the rate, and tendered the defendant 2*l*

for the same, and although the defendant, as such

overseer, had the rate in his possession, yet he would

not permit the plaintiff to inspect it, but refused, con-

trary to the form of the statute, whereby the defendant

forfeited 20*l*.

Second count, for not furnishing a copy

of the rate, averring a tender of 6*d*. for every twenty-four

pages; third count, the same as the second, omitting

the averment of a tender of 6*d*. for every twenty-four

pages; fourth count, the same as the second, omitting

the averment of a tender of 6*d*. for every twenty-four

pages; fifth count, the same as the second, omitting

the averment of a tender of 6*d*. for every twenty-four

pages; sixth count, the same as the second, omitting

the averment of a tender of 6*d*. for every twenty-four

pages; seventh count, the same as the second, omitting

the averment of a tender of 6*d*. for every twenty-four

pages; eighth count, the same as the second, omitting

the averment of a tender of 6*d*. for every twenty-four

pages; ninth count, the same as the second, omitting

the averment of a tender of 6*d*. for every twenty-four

the making, allowance, and publication of the rate, and the possession of the defendant. There was a similar set of counts, charging the defendant "as assistant overseer." Plea, general issue, and issue thereon. At the trial before *Littledale J.*, at the Summer assizes for the county of *Gloucester*, 1827, it appeared that the plaintiff was a rated inhabitant of the parish of *Almondbury*, and the defendant was an assistant overseer, appointed by a select vestry. On the 19th April, *Steele*, an attorney, (not a parishioner,) applied to the defendant, and said he was professionally engaged for *Bennett*, (the plaintiff,) who was dissatisfied with the rates and accounts; and had directed him, *Steele*, to inspect them. The defendant said that the books were at his house, and that *Steele* might inspect them there any day. The plaintiff and *Steele* afterwards required to see the rates, but did not tender the defendant any fee for shewing them. On the 23d May the plaintiff, accompanied by *Steele*, went to the defendant's house; the defendant met them in the yard close to the door. *Steele* said, "it is intimated to Mr. *Bennett* (the plaintiff) that the reason you refused to shew the accounts was because the proper fees were not tendered; I hope you will take the money, and let us see the rate." The defendant then said, "I cannot; I have the books, but I have orders not to shew them;" and a moment afterwards added, "*Bennett* may see them by going to the vestry," (explaining, upon enquiry, that he meant the select vestry, who had consented to meet at short notice should the plaintiff apply for inspection of the rate and accounts). The plaintiff then tendered 1s. 6d. and said he demanded inspection of the poor rate; and the defendant said, that he had orders not to shew them. A rate was allowed on the 17th May 1827, and published in church on the 20th, in the form following:

1827/1

Bennett
vs
Steele
Bennett

1897.

Prayer
made
for a writ

lowing: This is to give notice, that a rate or assessment of one shilling in the pound will be collected forthwith. The next preceding rate had been made the 8th December 1886, and published on the 24th. The action was brought before June 16th, so that no sessions intervened between the date of the refusal, and the commencement of the suit. Upon this evidence it was objected, *inter alia*, that the plaintiff not having been aggrieved by the defendant's refusal to produce the rate, could not maintain this action within the 17 G. 2 c. 3, which gives the penalty to the party aggrieved; and *Spence v. Robinson* (a) was cited: and on the authority of that case, but against his own opinion, the learned Judge directed a nonsuit, but reserved liberty to the plaintiff to enter a verdict for the penalty, if this Court should be of opinion that the plaintiff was a party aggrieved within the meaning of the statute. In *Michaelmas* term last, a rule nisi was obtained by *Campbell*, 100

Thunton, Ludlow Serjt., and Justice shewed cause. There was no legal demand made by the plaintiff to inspect the rate. It is quite clear, that the demand by the attorney, who was not an inhabitant of the parish, was not sufficient. And the subsequent demand made by the plaintiff (accompanied by the attorney) was not a compliance with the statute 17 G. 2. c. 3. s. 1, because the latter had no right to inspect the rate; and the defendant was required to permit the plaintiff and his attorney to inspect the rate. Neither did the demand point specifically to any particular rate. Secondly, the statute gives the penalty to the party aggrieved. Now here the plaintiff was not aggrieved by the refusal to produce the

(a) 3 D. & G. 658.

1897.

Printed
by
H. W. Swanwick.

rate, for notwithstanding such refusal, he might have
appealed to the next sessions. He has not, therefore,
a party aggrieved within the meaning of the statute,
Spencer v. Robinson (a). Thirdly, there was no due
publication of the rate, for it was not stated in the notice
that the rate was allowed by the justices. Fourthly,
the defendant's refusal was not absolute, but qualified;
for he told the plaintiff that he might inspect the rate
by going to the vestry. That was not an unlawful re-
fusal. Fifthly, an action is not maintainable against
an overseer who acts under the directions of a select
vestry. By the 58 G. 3. c. 69. s. 6. the vestry have
power to order how the books may be kept, and the
defendant was justified in refusing to produce the rate,
if he acted under the directions of the vestry. Besides,
if they have appointed any particular place for deposit-
ing the books, the house of the assistant overseer would
not necessarily be the proper place to make the demand.
The defendant stated, that the plaintiff might see the
books at the select vestry. He ought to have asked for
an inspection at the vestry room, where the select vestry
was sitting. But this action is not maintainable against
the defendant, who was proved to be an assistant over-
seer, appointed by a select vestry. The plaintiff can only
be entitled to recover on those counts which describe
the defendant as assistant overseer. Now the stat. 59 G. 3.
c. 38. s. 2, first, authorizes the appointment of assistant
overseers, but it does not make them liable to any
penalty for refusing to deliver the accounts. The
statute 17 G. 2. c. 3. s. 3. only subjects the *overseer or
other person authorized to take care of the poor* to
penalties for not delivering accounts. The defendant

(a) 3 B. & C. 658.

1837
 ———
 Defendant
 against
 Plaintiff

an office created subsequently to the passing of that act. He is not, therefore, an overseer within that act. The words "other persons authorised" apply to other officers then in being, such as chapel wardens.

Campbell and Philpotts contra. There was a sufficient demand by the plaintiff to inspect a specific rate; for although his attorney had no right to such inspection, he might lawfully accompany the plaintiff in order to prove the refusal, if such refusal was made. The demand was, to be allowed to inspect the rate. That must have referred to the rate in question, which was the only one then in existence. Next, the plaintiff was a party aggrieved within the meaning of the statute, for the withholding the inspection of the rate to which the plaintiff had a right, was in itself an injury. *Spenceley v. Robinson* was decided on the ground that the plaintiff had not made his demand at a reasonable time and place, and the dicta of two of the learned Judges, that the refusal to allow a rated inhabitant to inspect a rate is no grievance, cannot be supported. For it is necessary for a party to inspect the rate, in order to prepare his notice of appeal. The rate was duly published, for the statute only requires that notice shall be given of a rate allowed by the justices, and that was done. Besides, it is not competent to the defendant to say that the rate was not regularly published. It is sufficient that there was a rate de facto, and that the overseer treated it as an available rate, in order to give the inhabitants right to inspect it. There was also a refusal within the statute, for the defendant required the plaintiff to go before the select vestry. That was a condition which he had no right to impose, and, therefore, the refusal was unlawful. There as to the objection that an

assistant overseer is, not, within the 17 G. 2. the verdict may be confined to the counts charging the defendant as assistant overseer, and then that objection will appear upon the record, and may be the subject of a motion in arrest of judgment. But that statute imposes the penalty on any churchwarden or overseer authorized to take care of the poor. The defendant here was an overseer authorized by the select vestry to take care of the poor, and was therefore subject to the penalty.

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Barrow
Clerk
Barrow

BAYLEY J. In the course of the argument six questions have been presented, on one only of which we have felt any doubt. We will first dispose of the others in order. First, the presence of the attorney has been made an objection to the mode of making the demand; and it is said that, not being a parishioner, he and the plaintiff improperly required the defendant to give them inspection. But it appeared in the course of the evidence that the attorney had explained to the defendant that he asked for inspection on behalf of Mr. Bennett his client, and although by the statute 17 G. 2. c. 3. s. 3. an inhabitant alone is entitled to inspect the rate, yet his attorney, or any other person, may go with him to make the demand, or in case of an improper refusal, how can the demand be proved? Secondly, I think the plaintiff was a party aggrieved. Here the plaintiff had a right to see the rate, in order to satisfy himself whether he was fairly dealt with, and whether other parties were assessed at all, or to the full value, or whether he was overrated, and this inspection was wrongfully denied him. Thirdly, it is said that there was no proper publication in church, because the notice did not state that the rate had been allowed, but merely that it would be collected forthwith. Now the act requires no such publication in words.

All

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REVENUE
against
EDWARDS;

All that is required is that the churchwardens and overseers, or other persons authorized to take care of the poor in every parish, township, &c., shall give notice to be given public notice in church of every rate for the relief of the poor allowed by the justices of the peace the next Sunday after the same shall have been allowed; and that no rate shall be reputed valid unless sufficient, so as to collect and raise the money, unless such notice shall have been given." It does not say that notice shall be given "that the rate has been allowed," but "*of every rate allowed.*" This has been done here. It must have been in fact allowed, for such publication would be useless. A notice that a rate is about to be collected, ex necessitate implies that it has been allowed. Fourthly, the objection that there was not a sufficient demand, is answered by the fact that the plaintiff asked for *his* rate. There was no interruption at the time of such demand except this, which was published in church on the 20th of May, and demand was made on the 23d. Fifthly, it is said that the refusal was not absolute, because the books were refused to be produced at the vestry. But if a party entrusted with the rate has no right to insist on such books, then a refusal qualified by such terms as he has no right to insist on, is an unlawful refusal; and he thereby commits the offence of not permitting the parishioners to inspect the rate within the words of this act of parliament. The remaining question on which we doubt, is whether the defendant as assistant overseer be liable within the meaning of parliament. We all think that this rule ought not to be made absolute for entering a verdict for the plaintiff. For if we decide that an assistant overseer is liable to the penalty imposed by the 17 G. 2. act, it will still be a question of fact whether the defendant was such an

1857:

Stewart
against
Roberts.

an assistant overseer. If it was part of his duty to produce the rate, the plaintiff will be entitled to a verdict. But if it was not a part of his duty, there ought to be a nonsuit. Assuming, therefore, that we should be of opinion that an assistant overseer (whose duty it is to produce the rate), is an overseer within the meaning of the 18th Geo. 2. c. 24. s. 24, it will still be a question for the jury, whether the defendant was such an overseer. The rule, therefore, can only be made absolute for a new trial.

MR. JUSTICE J. The law knows what an overseer is, but it does not know what is an assistant overseer. He may be appointed generally to do all the business of an overseer, as a deputy, or only to keep the accounts or perform other particular business. If it were his duty to do all the acts which an overseer is bound to do, then he ought to have produced the rate. A jury must decide this by ascertaining the nature of his duty.

Cur. adv. vult.

MR. JUSTICE J. The question reserved for our consideration was, whether this action was maintainable against the defendant, an assistant overseer, appointed under the statute 59 Geo. 2. c. 12. s. 7. which enacts, "that it shall be lawful for the inhabitants of any parish, in vestry assembled, to elect any person to be assistant overseer of the poor of such parish, and to determine and specify the duties to be by him executed; and every person so appointed assistant overseer shall be authorised to execute all such of the duties of the office of overseer of the poor as shall in his warrant for his appointment be expressed in this respect, and so fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor." The select vestry, therefore, are to de-

1827.

Bennett against Edward

termine and specify the duties to be performed by the assistant overseer. It did not appear upon the trial, what duties the defendant was liable to perform. He may be liable to perform all or only some of the duties of overseer. It must depend on the nature of his appointment, therefore, whether it was part of his duty to exhibit the rate to the plaintiff in this case. There having been no evidence to shew that it was his duty as assistant overseer to produce the rate, the case must go down to another jury, in order that the nature of his duties may be ascertained. If the jury shall find upon the evidence that it was part of the duty of the defendant, as assistant overseer, to produce the rate, he will be liable to the penalty. The rule for a new trial must, therefore, be made absolute.

Rule absolute (a).

(a) At the second trial, before Park J., at the Spring assizes 1828, in addition to the evidence given at the former trial, it appeared that the plaintiff had given the defendant notice to produce his appointment to the office of assistant overseer. The defendant's counsel refused to produce it. The learned Judge left it to the jury, to infer from the conduct of the defendant when the rate was demanded of him, and from the fact of the non-production of his appointment, that it was part of his duty, as assistant overseer, to produce the rate. The jury found a verdict for the plaintiff on those counts which charged the defendant as assistant overseer.

PARKER *against* EDWARDS.

Where a demand to inspect a rate was made upon an overseer on his own premises, not far from his house, and he refused to allow house for that reasonable demand.

THIS was a similar action against the same defendants, and the circumstances differed only in this respect, that the plaintiff on the 1st of June went to the defendant's house, and was informed by his wife that he was

not

not at home, but in a field 300 or 400 yards distant from his (the defendant's) house. The plaintiff then went to the field and saw the defendant, and there demanded an inspection of the rate; the defendant refused to produce it; merely saying that he had orders not to shew it. In addition to those objections which were made to the plaintiff's right of recovery in *Bennett v. Edwards*, it was insisted in this case, that the demand was not sufficient, because it had not been made at the house of the overseer. The plaintiff was nonsuited for the same cause as in *Bennett v. Edwards*, and in last term *Campbell* obtained a rule nisi to enter a verdict for the plaintiff.

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—
Bennett
against
Edwards.

Taunton, *Ludlow* Serjt., and *Justice*, shewed cause. The demand ought to have been made on the overseer at his house, where the rate books are usually deposited. There is no obligation on an overseer to be always at home to give inspection to the inhabitants, much less to have the rate with him in any place wherever a rated inhabitant may demand it. *Spenceley v. Robinson* (a) shews that the house of the overseer is the place where the demand ought to be made. Unless it be held that the overseer was bound to go back at once and exhibit the rate, this demand was not proper; he might, on the same principle, be called upon to go five miles as well as a hundred yards. The party should have sought him at home, and repeated the demand there.

Campbell and *Philpotts* in support of the rule. The statute by implication requires that a reasonable demand

(a) 5 B. & C. 658.

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should be made. In *Spencer v. Robinson* (a), the Court held, that, in ordinary cases, the house of the overseer was a reasonable place for making the demand. This was a reasonable demand, for it was made near the owner's house, and upon his premises.

BAYLEY J. I think this demand was made at a reasonable place. The defendant was on his own premises, and near his residence at the time of the demand, and he did not object to produce the rate on the ground that it was inconvenient to him to go home. Let there be the same rule as in the other case.

Rule absolute for a new trial.

(a) 5 B. & C. 658.

The King against The Inhabitants of WHITNASH.

The statute 29 Car. 2. c. 7. s. 5. enacts, that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's day, and subjects parties offending to a penalty: Held, that this statute only prohibits labour, business, or work done in the course of a man's ordinary calling; and therefore, that a contract of hiring made on a Sunday between a farmer and a labourer for a year, was valid, and that a service under it conferred a settlement.

UPON an appeal against an order of two justices, whereby *J. Edgington* and his family were removed from the parish of *Rudford Semele*, to the parish of *Whitnash*, both in the county of *Warwick*; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, who was legally settled by parentage in the parish of *Rudford Semele*, was offered by his father to one *Cook*, of the parish of *Whitnash*, on Sunday, the 12th October 1817, as waggoner's boy, and was hired by *Cook* on that day for a year. The pauper went into

Cook's

Cook's service on *Tuesday*, the 14th, and served him under the above mentioned hiring, in the parish of *Whitnash*, until the 12th of *October* in the following year. *Cook* was a farmer, residing in the parish of *Whitnash*, and has been dead twelve months. The pauper worked for different persons in the parish of *Rudford Sekeley*, as a labourer in husbandry, both before and after the hiring in question.

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WHITNASH.

And and *Hill* in support of the order of sessions. The question is, Whether a hiring on a *Sunday* is a valid hiring or not by the statute 29 Car. 2. c. 7. s. 1. (a). It may be conceded, that if the making of the contract of hiring subjected the parties to the penalty imposed by the act, the contract was void. But this is not a case within the words or the mischief contemplated by the legislature. The object of the act was to prevent tradesmen and other persons of inferior condition in life from doing their daily work or business on *Sundays*, and, therefore, persons of that description are prohibited from doing any worldly labour, business, or work of their ordinary callings on a *Sunday*. Now the ordinary calling of a man is that daily occupation by which he gains his livelihood. The ordinary calling of the pauper was the performance of his daily work;

(a) Section 1. of that statute enacts, "That all and every person and persons whatsoever shall, on every Lord's day, apply themselves to the observation of the same by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling upon the Lord's day, or any part thereof (work of necessity and charity only excepted), and that every person being of the age of fourteen years or upwards offending in the premises, shall, for every such offence, forfeit the sum of five shillings."

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Whitnash.

the ordinary calling of the farmer was the cultivation of his land and the sale of his produce. The making of a contract of hiring for a year, was not the worldly labour, business, or work of the ordinary calling of either the master or servant. Besides, the statute imposes the penalty upon persons being of the age of fourteen years. Now here it does not appear that the pauper had attained that age, and if he had not, then he was not guilty of any offence within the act, and the contract was not void.

Goulburn and Pennington contra. The contract of hiring was illegal and void, and no settlement was gained by a service under it. The statute 3 & 4 W. & M. c. 11. s. 7. requires that a person shall be "*lawfully*" hired; and the statute 29 Car. 2. c. 7. expressly enjoins every person and persons whatsoever, (not mentioning persons who have an ordinary calling,) to apply themselves to the observance of religious duties, "publicly and privately;" and prohibits any tradesman, artificer, workman, labourer, or other person whatsoever, "from the exercise" of any worldly labour, business, or work of their ordinary calling. In *Fennell v. Ridler* (a), it was laid down by Bayley J. that the statute applies to acts which do not meet the public eye, but which interfere with a man's religious duties. The words "worldly labour, business, or work of their ordinary calling," are not to be construed collectively, but *disjunctively*, and the contract in this case was worldly *business*, even if it was not in the course of the ordinary calling of the parties making it. In *Smith v. Sparrow* (b), which is a very strong case, (for there the party, at whose

(a) 5 B. & C. 406.

(b) 4 Bing. 84.

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request the contract was entered into, was allowed to take advantage of his own wrong, and set it aside.) *Park J.* says, "the expression, '*any worldly labour*,' cannot be confined to a man's *ordinary calling*, but applies to any business he may carry on, whether it be in his *ordinary calling* or not." But, secondly, the contract here was clearly "*business in the ordinary calling*," as well of the master as of the pauper. As to the former, it is a part of the *ordinary calling* of a farmer to hire labourers and farming servants; it is an act without which the business of a farmer cannot be carried on, And so as to the pauper, who was a "*labourer*," and within the express words of the statute, he could not carry on his *ordinary calling* of labour without hiring himself. Suppose he had hired himself on *Sunday* for that day's work, could he have sued on such a contract? and can it make any difference whether the contract be for a day, a month, or a year? It is equally an act in his *ordinary calling*; for without it his *ordinary calling* could not be carried on. It is a contract in which, on the one side there is labour, and on the other money, and being made on the *Sunday*, is within both the words and spirit of the act.

BAYLEY J. The act of parliament ought to be so construed as to advance the objects contemplated by the legislature, but not so as to make every work or business done on the Lord's day illegal. The words of the statute are, "that no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work, of their *ordinary callings*, upon the Lord's day." Now if the legislature had intended to embrace every description of persons,

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of the
Parish of
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the County of
Middlesex.

and every species of business, it would not have been necessary to make an enumeration of several kinds of persons exercising particular descriptions of labour or business. It would have been sufficient to say that no person whatever should do any work or business on the Lord's day. If the enactment had been intended to be general, the legislature would have used general words: it has been argued that the words "worldly labour, business, or work of their ordinary callings," are to be construed disjunctively. The true construction of the clause appears to me to be, that the persons there mentioned shall not, on the Lord's day, do or exercise any labour of their ordinary calling, any business of their ordinary calling, or any work of their ordinary calling. The hiring of a servant seems to fall properly within the meaning of the word business. And if the true construction of the act be, that every description of business is prohibited, all contracts whatever made on a *Sunday* will be void: I think that that was not the intention of the legislature: Religion and piety do not require that every moment of every *Sunday* should be devoted to the performance of religious exercises. To a reasonable degree, a man may on that day consider his own condition and that of his neighbour, and may do acts beneficial to himself, and calculated to promote the comfort of his neighbour: I am of opinion that this act of parliament does not prohibit labour, business, or work of every description; and that the hiring of a servant by a farmer on a *Sunday* is not work or business within the meaning of the act of parliament. I also think that it is not labour, business, or work of the ordinary calling of the farmer. He, like every other person who requires servants, must hire them. The true construction of the words "ordinary

" ordinary

“ordinary calling,” seems to me to be meant that which trade or business cannot be carried on, but that which the ordinary duties of the calling bring into continual action. These things which are repeated daily or weekly in the course of trade or business are parts of the *ordinary calling* of a man exercising such trade or business, but the hiring of a servant once in the year does not come within the meaning of those words. For these reasons, I am of opinion that the contract of hiring in this case was valid, and consequently that a settlement was gained.

HOBHOUSE, J. I also think that the contract of hiring was not void by reason of its having been made upon a *Sunday*. The great object of the statute was to prevent persons carrying on their trade and ordinary occupations and callings on the Lord's day. And, although it may perhaps be desirable that other secular concerns (besides those expressly mentioned in the statute) should be comprehended in it, we must not extend the words of the statute beyond their natural import. Here the legislature enacts, not that no person whatever, but that “no tradesman, artificer, workman, labourer, nor other person whatsoever,” shall do any work. &c. The words, “other person whatsoever,” must, according to the general rule, that preceding particular words cannot, subsequent general words, be construed to mean persons *ejusdem generis* with those previously mentioned. All the persons previously mentioned exercise an ordinary calling. The statute, therefore, in substance enacts, that persons having an ordinary calling, shall not do any worldly labour, business, or work of their ordinary calling. I think, therefore, that the pro-

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hibitory

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hibitory clause must be confined in construction to worldly labour, work, or business of their ordinary calling. Unless, indeed, it be perfectly clear that it extends to all worldly business, that must be its construction, because this is a penal enactment, for every contract which is void within the first part of the clause, subjects the parties making it to a penalty. It must, therefore, be construed strictly. It seems to me, that the hiring of a servant by a farmer, although servants may be useful or even necessary for carrying on his ordinary calling, is not a part of it. If a farmer sold his corn, or his servant ploughed his land, those would be parts of their ordinary callings. I think the making of a contract with a person who is to assist another in his ordinary calling, does not come within the meaning of the words "worldly labour or business, or work of his ordinary calling," so as to subject the parties to the contract to a penalty, or so as to avoid the contract.

LITLEDALE J. The words "of their ordinary calling," extend not only to the word "work," which immediately precedes it, but to the two preceding words "labour and business." The word "worldly" also extends to the three substantives, "labour, business, or work." This is consistent with the context of this clause. It begins with mentioning tradesmen, artificers, labourers, or other persons. That evidently implies that they were persons who had an ordinary calling. If it had intended that no person should do any work on a Sunday, it would have used different language. The words *other persons*, mean persons *ejusdem generis* with those before mentioned, but who, perhaps, might not strictly be included in these words. The act of parliament

ishment seems to me to be confined to persons having an ordinary calling; and if that be so, then it prohibits such persons from doing any worldly labour, business, or work of *their* ordinary calling on a *Sunday*. If it embraced every description of worldly labour, business, or work, the consequence would be, that almost every person in every rank of life would incur the penalty. The subsequent provision, that no person shall expose any wares, &c. shews that this statute was intended to be confined to persons exercising their ordinary calling on a *Sunday*. The hiring of a servant is no more a part of the ordinary calling of a farmer, than it is of any other person who requires the assistance of servants. For these reasons, I am of opinion that this was a valid hiring, and that the pauper gained a settlement by service under it.

Order of sessions confirmed.

The KING *against* The Inhabitants of
COTTINGHAM.

UPON an appeal against an order of two justices, whereby *W. Hardy* junior and his wife were removed from the township of *Bishop Burton*, in the East Riding of the county of *York*, to the township of *Cottingham*; in the said riding; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, *W. Hardy*, had acquired no settlement in his own right, but followed that of *W. Hardy*, his father, and the only question at the sessions was, whether *Cottingham* or *Bishop Burton* was the last place of settle-

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ants of
Whitnash.*

The sum paid by the purchaser of a copyhold estate to his attorney for the surrender, is no part of the consideration for the purchase within the meaning of the stat. 9 G. 1. c. 7. s. 5.

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settlement of the father. It was admitted that the father had acquired a settlement in *Cottingham*, but it was insisted that he had afterwards acquired a settlement in *Bishop Burton* by the purchase of a cottage situate in that parish. In 1813 the father agreed with one *Page* (who then resided at *Feversham* in *Kent*.) for the purchase of a copyhold cottage situate at *Bishop Burton*. It was agreed that *Hardy*, the father, should pay 22*l.*, and all the expences attending the sale. Upon these terms the purchase was made. On the 22d *July* 1813 the cottage was surrendered to the father; in the year 1814 he was duly admitted according to the custom of the manor, and he has ever since continued to reside in it. The amount paid by the father relative to this purchase was as follows: To *E. Page* 22*l.*, the purchase-money; a fine to the lord of the manor 3*l.* 10*s.*; 1*l.* 15*s.* to the steward for his admission copy; 5*s.* 6*d.* to his (*Hardy's*) attorney for instructions for surrender of the cottage from *Page* and his mother; 1*l.* 1*s.* for drawing and engrossing power of attorney from the steward of the manor of *Bishop Burton* to one *Tappenden*, to take *Page's* surrender; 13*s.* 6*d.* for drawing and engrossing surrender; and other fees, amounting in the whole to 39*l.* 15*s.* 8*d.* The question for the opinion of this Court was, Whether *Hardy*, the father, gained a settlement in *Bishop Burton* by reason of this purchase of the cottage, and a residence therein of forty days?

Archbold in support of the order of sessions. The statute 9 G. 1. c. 7. s. 5. enacts, that no person shall be deemed to acquire a settlement in any parish by virtue of any purchase of any estate in such parish, whereof the consideration for such purchase doth not amount to the

the sum of 30*l.* *bonâ fide* paid. Now here the sum paid to the vendor was only 22*l.*, and consequently, no settlement was gained,

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Coltman and *Patteson* contra. The statute says that 30*l.* shall be paid by the purchaser, not that it shall be paid to the seller; and this is said to be sufficient in *Nolan's Poor Laws*, vol. 2. p. 110. (4th edition), and *St. Paul's Walden v. Kempton* (a) is there cited as an authority to shew that a copyhold tenement, the price of which, together with the fines and fees paid to the court, amounted to 30*l.*, conferred a settlement. In *Graham v. Sime* (b) it was held, that a covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c., for the perfect surrendering and assuring the premises, at the costs and charges of the seller, was not broken by non-payment of the fine to the lord on the admission of the purchaser. [*Littledale* J. There the title was perfected by the admittance of the tenant, and the fine was not due until after the admittance. The case, therefore, is not in point.] In *Rex v. Scammonden* (c), the expence of levying a fine in the Common Pleas, which was necessary to complete the title, and which ought, therefore, to have fallen upon the vendor, if the purchaser had not expressly agreed to pay it, was held by the sessions to be part of the consideration for the purchase. The judgment of this Court proceeded upon another ground, but no fault was found with the decision of the sessions in that respect.

BAYLEY J. This case admits of no doubt. The question is, What was the consideration for the pur-

(a) 2 Burr, 1081. 4 Burr, 846. (b) 1 East, 632. (c) 5 T. R. 174.

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chase bona fide paid, within the meaning of the act of parliament? I think that the sum given to the seller for selling his interest in the land, and to other persons whose concurrence was necessary to make the sale valid and effectual, was the consideration for the purchase. The fine paid to the lord, and the fees paid to the steward, in my opinion, form part of that consideration. But the sums paid to the vendor, the lord, and the steward, do not amount to 30*l*. The expences of the surrender paid by the purchaser to his own attorney, were no part of the consideration for the purchase. The cases cited are distinguishable from the present. In *Rex v. Scamonden* (a) the purchaser paid 30*l*., for he paid the expences of levying a fine which it was necessary for the seller to levy in order to complete the title, and which he ought to have paid for if the purchaser had not agreed to pay. In *St. Paul's Walden v. Kemp-ton* (b), 30*l*. was paid, including the fine to the lord, and the fee to the steward.

LITLEDALE J. I think the consideration for the purchase was the sums paid to the purchaser, and to the lord. The lord has an interest in the land, and the fine may be considered as paid to him for the purchase of part of his interest in it. I doubt whether the fee to the steward can be considered as part of the consideration for the purchase. The steward has no interest in the land. But it is unnecessary to decide that, because the money paid to the seller, the lord, and the steward, does not amount to 30*l*.

Order of sessions confirmed.

(a) 3 T. R. 474. 2 Bott. 510. 4 Burr. 640.

(b) 2 Bull. 504.

1827.

The KING *against* The Inhabitants of
RINGSTEAD.

UPON appeal against an order of two justices, dated the 17th of *March* 1827, whereby *Elinabeth*, the wife of *J. Sanders*, and their four children, were removed from the parish of *Kimbolton*, in the county of *Huntingdon*, to the parish of *Ringstead*, in the county of *Northampton*, the sessions confirmed the order, subject to the opinion of this Court on the following case :

The pauper's husband, who had absconded previous to the order of removal, hired a tenement after *Lady-day* 1825 in the parish of *Ringstead*, of the annual value of 10*l.* and upwards, from *Lady-day* 1825 to *Lady-day* 1826, and went to settle upon it on the 4th day of *May* 1826, being upwards of forty days before the passing of the 6 G. 4. c. 57. (22d day of *June* 1825.) A rate was made for the relief of the poor, which was allowed on the 27th of *May* 1825, and was paid a few days afterwards, being less than forty days before the passing of the said statute, (and the requisites mentioned in the 59 G. 3. c. 50. were not complied with, so that no settlement by renting the tenement could be gained under that statute.) On the 2d of *March* 1825 a church-rate was made at a parish meeting for the parish of *Ringstead*, and on the pauper's husband coming into the parish on the 4th of *May* 1825, his name was inserted in the church-rate by the churchwarden, and the rate was afterwards paid by the pauper's husband. The question was, Whether a settlement was gained by either of such ratings or payments?

The being charged with, and paying parochial taxes, did not, before the stat. 6 G. 4. c. 57. s. 2., confer any settlement until the party charged with, and paying the same, had resided within the parish forty days after he had been so charged, and since that statute passed, no person can acquire a settlement by reason of renting or paying parochial taxes for any tenement, unless it be of a certain description; and, therefore, where a pauper had rented a tenement (insufficient to confer a settlement under the 6 G. 4.) and in respect thereof, had been rated and paid parochial taxes, but had not resided thereon after such rating and payment forty days before the passing of the 6 G. 4., it was held, that he did not thereby acquire any settlement.

Nolan

1837.

—
The King
against
The Inhabit-
ants of
RINGSEAD.

Nolan in support of the order of sessions. It was decided in *Bor v. St. Pancras* (a), that since the statute 35 G. 3. c. 101., a settlement might be gained by being rated and paying parochial rates in respect of a tenement above the annual value of 10*l*. But the statute 6 G. 4. c. 57. (which took effect on the 22d of June 1825,) enacts that no person shall gain a settlement by paying parochial rates in respect of a tenement, unless certain other things therein mentioned be done. It must be admitted, that under that statute no settlement was gained. Here, however, the pauper on the 22d of June 1825 had been charged with and paid parochial taxes, although he had not then resided forty days after he had been rated and paid such taxes. The statute 3 & 4 W. & M. c. 11. s. 6. does not require that in order to gain a settlement by being charged with and paying parochial rates, there should be forty days residence. The rating is an adoption by the parish of the party rated as one of the parishioners. As soon, therefore, as they have rated him, and he has paid the rate, he is a settled inhabitant.

Campbell and Flanagan contra. The pauper had not been assessed to, or paid the poor-rate forty days before the 22d of June 1825; and it does not appear that he had paid the church-rate forty days before that G. 4. c. 57. passed. In order to gain a settlement, by being charged with, and paying parochial taxes, it is necessary that a party should reside in the parish forty days after he has been charged with and paid the rate. The 1 Jac. 2. c. 17. s. 3. enacted that the forty days continuance of a person in a parish (intended by the act of the

(a) 5 B. & C. 128.

13 & 14 Car. 2. to make a settlement) should be accounted from the time of his delivery of a notice in writing of the place of his abode to one of the parish officers. The statute 3 & 4 W. & M. c. 11. s. 3. enacts, that the forty days' continuance intended by the said acts to make a settlement shall be accounted from the publication of a notice in writing in the manner therein mentioned. Then section 6. provides, "that if any person, who shall come to inhabit in any town or parish, shall, for himself, and on his own account, execute any public or annual office or charge in the said town or parish, or shall be charged with, and pay his share towards the public taxes or levies of the said town or parish, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereby before required." The being charged with and paying rates, is, therefore, substituted for the notice required to be given to the parish officers, and published. And as a party could not gain a settlement until he had continued in a parish forty days after the giving and publication of the notice, it follows that a party cannot gain a settlement by being charged with and paying parochial taxes, until he has resided in the parish forty days after he has been so charged with and paid such taxes. This is consistent with the view taken of the subject by Mr. Nelson in his *Peer Cases*, vol. ii. p. 198.

1827.

The King
against
The Inhabit-
ants of
Ringsham.

HAYES J. I think that in order to gain a settlement in this case by the payment of rates the person ought to have resided in the parish forty days after he had been rated and paid the taxes. By the statute 1 Jac. 2. c. 3. the forty days' continuance of a person in a parish (intended by the 13 & 14 Car. 2. to make a settlement) is to

1827.

The King
against
The Inhabit-
ants of
Ringshead.

be accounted from the time of his delivery of a notice in writing, of the house of his abode, to one of the parish officers, and by section 3. of the 27th of March 1825, from the publication of such notice in the manner therein mentioned. It is clear, therefore, that in order to gain a settlement, it was necessary that a party should continue in a parish forty days after the giving and publication of the notice to the parish officers. But section 6. of the latter statute provides, "that if any person who shall come to inhabit in any parish shall be charged with and pay his share towards the public taxes of the parish, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereby before required." By this clause, the legislature, therefore, evidently consider the being charged with and paying parochial taxes equivalent to the giving and publishing of the notice in writing required in other cases. As it is necessary, therefore, to reside forty days in a parish after the giving and publication of notice, it follows that, in order to gain a settlement by reason of having been charged with and paid parochial taxes, a party ought to reside forty days after he has been so charged with and paid such taxes; and if that be so, then on the 22d day of June 1825 the pauper had not resided forty days after the making of the poor rate, and it does not appear that he resided forty days after payment of the church rate, for it is not stated when that rate was paid. It is not shewn, therefore, that he had gained any settlement by having been charged with and paid parochial taxes on the 22d of June 1825; and the statute 6 G. 4. c. 57. has prevented the gaining of a settlement after that period, unless the tenement has all the qualities there described, which in this case it had not.

LITTLEBAIN &c. The statute 3 & 4 W. & M. c. 11. s. 6. confers a settlement on any inhabitant who has been charged with and paid his share towards the parochial taxes. The settlement, however, is not acquired until the rates are actually paid. Before that time the parish need not take any notice of the party. The payment of the taxes with which the party is charged is by the statute made equivalent to the notice otherwise required to be given to the parish officers. Now, as a person could not gain a settlement until he had continued forty days in the parish after such notice had been given and published, I think it follows as a necessary consequence, that no settlement could be gained by the pauper in this case until he had continued in the parish forty days after he had paid the taxes with which he was charged. It does not appear that he had paid any taxes on the 22d of June 1826; consequently it is not shewn that at that time he had acquired any settlement, and the stat. 6 G. 4. c. 137. prevented his gaining any settlement after that period. The order of sessions must be confirmed.

need go into the merits of the case. **Order of sessions confirmed.**

or if you wish to go into the merits of the case, you must

bring down a bill of costs, and then the court will

give you a bill of costs, and then the court will

give you a bill of costs, and then the court will

The King against The Inhabitants of HOLY TRINITY, in the Town of KINGSTON-UPON-HULL.

and now the court will give you a bill of costs, and then the court will

UPON appeal against an order of two justices, where-
as by *William Thomas*, his wife, and children, were
removed from the township of *Ecclethorpe Bierlaw*, in the
West Riding of the county of *York*, to the township of

Kingston upon Hull,

1827.

**The King
against
The Inhabit-
ants of
Kingston.**

Parol evidence
of the fact of
tenancy is ad-
missible, al-
though the ten-
ant hold under
a written agree-
ment.

1827.

The King
against
The Inhabit-
ants of
Holy Trinity,
Kingscross-
uncon. Hall.

Hull, in the East Riding of the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The respondents having proved that the pauper had gained a settlement in the appellant parish, the appellant's counsel, upon the cross-examination of the pauper, a brickmaker, was proceeding to shew that he had, in the year 1813 or 1814, acquired a settlement at *Whitgift* subsequently to that established by the respondents, by the occupation of a tenement, and to prove what was the rent paid for the same, whereupon the respondents' counsel interposed, and asked the pauper whether the contract under which he had held the tenement was not in writing, and on his admitting that it was, they objected that parol testimony could not be received. The appellant's counsel contended, that they had nothing to do with the agreement, that all they proposed to prove was the fact of the occupation and the annual value of the tenement, which they were at liberty to prove by the cross-examination of the pauper, without reference to the agreement; but the court of quarter sessions being of opinion that the contract must be proved, and that such parol evidence could not be received, confirmed the order, subject to the opinion of this Court.

Blackburne in support of the order of sessions. The object of this examination was to prove a settlement in another parish. The coming to settle on a tenement in the statute 13 & 14 Car. 2, means by renting a tenement, or holding in the character of tenant, *Rex v. Bowness (a)*, *Rex v. St. John's, Glastonbury (b)*. The

(a) 1 M. & S. 210.

(b) 1 M. & S. 210.

taking in this case must be proved by the contract between the parties, and it was not sufficient for the witness to occupy, unless he occupied as tenant, for he might be in as servant or as owner. It is a different question, whether payment of rent may be proved by parol, but the agreement must be looked to to shew the terms of the holding. In *Brewer v. Palmer* (a), which was an action for use and occupation, the premises having been demised by an agreement in writing, it was holden that it must be produced. So it must to shew that a settlement has been gained, *Rex v. Castle Morton* (b). [Bayley J. There the Court only held that they could not receive parol evidence of a written agreement which was void.] Here the defendant occupied land, but he might occupy by wrong, and not in the character of tenant.

Coltman contra. If it had been necessary to prove the terms on which the pauper held the tenement, the evidence would have been insufficient; as if this case had arisen subsequently to the statute 59 G. 3. c. 50.; but it was wholly immaterial for what time the tenement was taken, or at what rent. It was only necessary to prove that the pauper occupied as *tenant*; that fact may be implied from the acts of the parties, or from the payment of rent, or the mere fact of occupation, *Rex v. Netherseal* (c), *Rex v. Fritwell* (d). Though the contents of an instrument cannot be proved by parol evidence, its general character may: this distinction is noticed by *Chambre J.* in *Bucher v. Jarratt* (e): there the existence of

1827.

—
The King
against
The Inhabit-
ants of
Holy Trinity,
Kingston-
upon-Hull.

(a) 3 Esp. 213.

(b) 5 B. & A. 588.

(c) 1 T. R. 255.

(d) 1 T. R. 197.

(e) 5 B. & P. 145.

1827.

The King
against
The Inhabit-
ants of
HOLY TRINITY,
KINGSTON-
UPON-HULL.

a certificate was allowed to be proved by the production of the registry from which it was copied, though no notice had been given to produce the certificate itself. So here it was competent to prove the general situation of the pauper with respect to the premises, whether he was there as servant, owner, or tenant, provided that could be done without going into minute particulars of the instrument. In *Davis v. Reynolds* (a) it was held that where goods consigned to A, upon their arrival were landed on the defendant's wharf, the plaintiff in trover might prove his title by parol, although the bill of lading which had been endorsed to him could not be received in evidence for want of a stamp.

— 1989

BAYLEY J. The general rule is, that the contents of a written instrument cannot be proved without producing it. But, although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol, without proving the terms of it. It was unnecessary in this case to prove by the written instrument, either the fact of tenancy or the value of the premises.

LITTLEDALE J. Payment of rent as rent is evidence of tenancy, and may be proved without producing any written instrument.

The case ordered to go back to the sessions to hear the evidence.

The case ordered to go back to the sessions to hear the evidence.

1827.

The King against The Inhabitants of COTTINGHAM.

UPON an appeal against an order of two justices, whereby *Anne*, the wife of *Patrick O'Hara*, and her four children, were removed from the parish of the *Holy Trinity*, in the town and county of *Kingston-upon-Hull*, to the parish of *Cottingham*, in the East Riding of the county of *York*, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

Anne O'Hara's maiden settlement was in *Cottingham*, and she had acquired no subsequent settlement. It was admitted that the settlement of her eldest child *Henry*, who was born a bastard, was also in that parish. *Patrick O'Hara*, a native of *Ireland*, was married to the said *Anne* on the 28th of *April* 1819, and the three youngest children were the issue of such marriage: he had no settlement in *England*. Sometime in the year 1819, after the marriage, and whilst *Patrick O'Hara* and his wife resided at *Hull*, *Anne* and her eldest son became chargeable to *Hull*, and were thereupon (with the consent of the husband) removed to *Cottingham*, the place of her maiden settlement, and the order of removal upon that occasion stated her to be the wife of *Patrick O'Hara*, an Irishman, who had no settlement in *England*, and the said *P. O'Hara* had consented to her removal. This order was not appealed against, and the appellant parish granted relief to *Anne* and her said child for a short time. In the early part of 1827

The wife of an Irishman, who has no settlement in *England*, may, if deserted by him, be removed to her maiden settlement.

1827.

The King
against
The Inhabit-
ants of
COTTINGHAM.

P. O'Hara having left *Hull*, and it not being known what had become of him, the wife and family again became chargeable to the parish of the *Holy Trinity*, who, as above stated, removed them to *Cottingham*. The sessions thought that they might be removed to the place of the wife's maiden settlement, and confirmed the order, subject to the opinion of this Court.

JUR. 511

Coltman in support of the order of sessions. If the husband in this case had been an *Englishman*, and had no settlement, and he had run away and lived separate from his wife, it is quite clear that she might have been removed to her maiden settlement, whenever she became chargeable, *St. Botolph's, Bishopsgate, v. St. John's, Wapping* (a); *Rees v. Westtham* (b); and *Rees v. Harbortown* (c). In *Rees v. Norton* (d), indeed, it appears to have been held that the maiden settlement of a woman deserted by her husband, an *Irishman*, who had no settlement in *England*, during coverture was suspended, and she could not be removed thither; but that case was overruled in *St. Botolph's, Bishopsgate, v. St. John's, Wapping*. There it was held that the settlement was suspended so long only as the wife continued under the power and protection of her husband, and was maintained and supported by him; and the wife, who had been deserted by her husband, who was an *Irishman*, was held to be removeable to her maiden settlement. Besides, by the consent of the husband, the wife may at any time be removed to the place of her maiden settlement, *Rees v. Burnham* (e). Now the desertion of the wife by the hus-

(a) 4 Burn's J. 289.

(b) 4 Burn's J. 515.

(c) 15 East, 311.

(d) 4 Burn's J. 515.

(e) 5 East, 115.

band is equivalent to consent on his part. Then the statute 50 G. 3. c. 12. s. 38. does not apply to this case. It authorises the removal of any person born in *Scotland* and *Ireland* together with his wife and children, either to *Ireland* or *Scotland*. But here the husband of the pauper was absent, and therefore incapable of being passed to *Ireland*. This, therefore, is not a case provided for by the act.

And II. *Ambold and Peterson* contra. The maiden settlement of the wife was suspended during her coverture, and therefore she was not removable to *Cottingham*. The circumstance of the husband having deserted the wife makes no difference. If it did, his desertion for (any period) however short, would revive her maiden settlement. *Res v. Elham* (a) was decided before the passing of the 50 G. 3. c. 12., which has altered the law in this respect. For by that statute the whole family of the husband may be passed either to *Ireland* or *Scotland*, and in *Res v. Leach* (b) it was held that the wife of a *settled* man, who had been settled in *England* before her marriage, and her children who were born there, but had not acquired a subsequent settlement, must, if chargeable, be sent along with the husband to *Scotland*, and could not be removed to the maiden settlement of the wife even with her husband's consent.

And III. *Barry v. J.* This is a very plain case. Before the statute 50 G. 3. c. 12. passed, it was clearly established by a series of authorities, from the case of *St. John's, Wapping*, v. *St. Botolph's, Bishopsgate* (c), to *Res v. Har-*

(a) 5 East, 115.

(b) 4 B. & A. 498.

(c) Burr. & C. 367.

1827.

The King
against
The Inhabit-
ants of
COTTINGHAM.

1827.]

The King
against
The Abbess
and
Convent

veritas (a), that where a woman who had a settlement, married, and was deserted by her husband, who had no settlement, the maiden settlement of the wife was thereby revived, and she might be removed thither. Here the husband at the time when the order of removal was made had deserted his wife, and she did not know where he was. According to the authorities she was clearly removable to *Gillingham*, unless the law in this respect has been altered by the 59 G. 3. c. 12. 1818. The mischief recited in the thirty-third section of that statute is, that poor persons born in *Scotland* or *Ireland* frequently become chargeable to parishes in *England*, and cannot be removed unless they have committed some act of vagrancy, and have been adjudged to be rogues and vagabonds; and it then authorizes and requires two magistrates, upon the complaint of the parish officers, that any person born in *Scotland* or *Ireland* has become chargeable to such parish by himself or his family, to cause such person to be brought before them, and to examine him touching the place of his birth, or last legal settlement, and if it shall be found that the person so brought before them was born in *Scotland* or *Ireland*, &c., and has not gained any settlement in *England*, then the justices are authorized, by a peace under their hands and seals, to cause such person and his wife, if so be it shall be proved to the place of his birth in the manner therein mentioned. The object of the Legislature, therefore, was to relieve parishes from the necessity of maintaining as perpetual paupers those born in *Scotland* or *Ireland*; and with that view it authorizes their removal to the place of their

(a) 15 East, 511.

birth,

birth, together with their wives, &c. The statute does not authorize the removal of the wife alone to the place of the birth of the husband; and the husband having quitted the parish could not be removed to *Ireland*, and that being so, the wife could not be removed without him. This is a case, therefore, not within the act of parliament; and the law applicable to this case remains as it was before the passing of the act. In *Rever. v. Hutton-Norris* (a) the same construction was put upon this statute. In that case, a Dutch pensioner, born in Scotland, left his wife and family at *Hutton-Norris* whilst he came to do town duty, and in his absence the wife and family were removed to the wife's maiden settlement. On appeal, the sessions stated a case, in which the only question they put was, whether under the 59 G. 3. c. 12, s. 33, the removal ought to have been to Scotland. The Judges thought not. In *Rever. v. Leeds* it was only decided that where the husband (who was born in Scotland) and his wife were living together, the wife must be sent along with him to Scotland. The law applicable to this case remains the same as it was before the 59 G. 3. c. 12, s. 33, it follows, therefore, that the wife and children were clearly removable to the place of her maiden settlement. No mischief will result from this decision, for during the absence of the husband the parish will be maintained by the parish which disbound to maintain them; and upon his return that parish may pass him and his family to *Ireland*. The order of sessions ought, therefore, to be confirmed, and the sessions ought to be confirmed. Order of sessions confirmed.

(a) *Easter term, 1821.*

1827.

The King
against
The Inhabitants
of
Connaught.

1827.

It was proved by a pauper, that he had been bound apprentice twenty-three years ago to *A. B.*; that indentures were signed and sealed, and that he served seven years, and that *A. B.* had the indentures; that when the apprenticeship expired, the pauper asked *A. B.* for the indentures, and he said the parish officers had them: Held, that the declarations of *A. B.*, who might have been called as a witness, were not admissible in evidence, and that parol evidence of the contents was not admissible.

The King against The Inhabitants of Denio.

UPON appeal against an order of two justices, whereby *William Roberts*, his wife and children, were removed from the parish of *Llanobelgiddy*, in the county of *Carmarthen*, to the parish of *Denio*, in the same county; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper being a poor boy belonging to the parish of *Llanbellig* was bound by the overseers of the poor of that parish as apprentice to one *J. Connell*, a hatter, residing at *Porthely*, in the parish of *Denio*, about twenty-three years ago, by an indenture for seven years; on which the pauper said he believed there was a stamp, and that it was signed and sealed; and there were no justices present at the time of the signing and sealing of the indenture, nor did the pauper recollect being at any other time before any justice respecting it; and there was no evidence that the assent of two justices had been given, or that the parish officers were parties to the indenture. The pauper also said, that the indenture was then kept by *Connell*, the master, and that he the pauper never saw it afterwards; that he served in *Denio*, under the indenture of apprenticeship for the whole term of seven years; that when the apprenticeship expired, he asked his master, *Connell*, (who was then a rated inhabitant of the parish of *Denio*, but did not reside or pay taxes there when the appeal was tried,) for the indenture, who said that he had not got it, but that it was with the overseers of *Llanbellig*. No other witnesses were called, nor any further evidence given respecting it, except that the present parish officers of *Llanbellig* proved at the trial

that

that they had searched among the papers belonging to that parish for the indenture, and that it could not be found; and that all the parish books and papers about that date were missing. The order of removal was confirmed, subject to the opinion of this Court as to whether the declarations of *Cornell* were properly received in evidence; and whether, according to the foregoing facts, the loss of the indenture was sufficiently proved, or accounted for, to let in parol evidence of its contents.

Nolan in support of the order of sessions. Diligent search was made for the indenture in the place where it was likely to be found. There was no proof that more than one indenture had been executed. The declaration of the master that the overseers of *Llanbelleis* had got the indenture was admissible, because being at that time a rated inhabitant, it was against his interest to make that declaration. *Rees v. Morton* (a) is in point. There only one part of the indenture had been executed, and both the pauper and master were dead at the trial. On enquiry made from the pauper shortly before his death, he said the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it. And enquiry had also been made of the daughter and executrix of the master, who said that she knew nothing about it, and no further search was made. The Court held the proof to be sufficient to let in parol evidence of the contents of the indenture. If the declaration of the executrix were admissible in that case, the declaration of the master was admissible in this.

Patterson, contra, was stopped by the Court.

(a) 4 M. & S. 48.

1827

The King
against
The Inhabit-
ants of
Dunro.

1827.

The King
against
The Inhabit-
ants of
Bassib.

BAYLEY J. The decision in that case did not proceed on the ground that the declaration of the executrix of the master was admissible; but that if the declaration of the pauper were admissible so as to shew a possession of the indentures by him, it shewed also that further search or enquiry was unnecessary, because he stated that it had been given up to him, and that he had burnt it. In this case *Donkell*, the master, owns the indenture, and might have been called as a witness to prove either that he had delivered his copy of the indenture to the parish officers or had destroyed it, or that there were originally two parts, and the parish officers had one. His declarations clearly were not admissible in evidence. There was not sufficient evidence to shew that a bona fide and diligent search was made for the instrument where it was likely to be found, so as to let in parol evidence of the contents. In *Rex v. Castleton (a)* there were two parts of an indenture of apprenticeship, one which was proved to have been destroyed, and the other had been delivered to Miss Taylor of *Bomford*, to whom the apprentice had been assigned. Evidence was given that application had been made to Miss Taylor, who had caused to reside at *Bomford*, for the part delivered to her, and that she had said that she could not find it, and did not know where it was; but Miss Taylor, though still living, was not called as a witness. The Court held that the part so delivered had not been sufficiently accounted for; it had been traced into the hands of Miss Taylor, but no further evidence had been given to shew what had become of it. That case is precisely in point. The order of sessions must therefore be quashed.

Order of sessions quashed.
(a) 6 T. R. 236.

CASES

ARGUED AND DETERMINED

Court of KING'S BENCH,

Hilary Term,

In the Eighth and Ninth Years of the Reign of
George IV.

MEMORANDUM.

In the course of this term **Sir James Scarlett** re-
signed the office of Attorney-General, and was suc-
ceeded by **Sir G. Wetherill**.

Tucker and Another, Assignees of HICKMAN
a Bankrupt, against BARROW.

Wednesday,
January 23d.

ASSUMPSIT for money had and received to the
use of **Hickman** before the bankruptcy, and on an
account stated with him before his bankruptcy, money

Where a party,
examined be-
fore commis-
sioners of bank-
rupt, admitted
that he had re-

ceived a sum of money on account of the bankrupt after an act of bankruptcy, but not that
it was a retarding debt. Held, that this was not evidence sufficient to support a count on
an account stated with the assignees.

Query, Whether an admission obtained by such compulsory examination can be used as
evidence in such an action?

had

1828,

———
 TUCKER
 against
 BARROW.

had and received to the use of the assignees after the bankruptcy, and on an account stated with them as assignees. At the trial before Lord Tenterden C. J. at the *Guildhall* sittings after last Michaelmas term, the plaintiffs having failed as to the first three counts, in support of the last gave in evidence the examination of the defendant taken on the 5th of July 1826, before the commissioners under the commission against *Fitcham*. The examination was as follows: "Have you received any monies on account of the bankrupt?—Answer, Yes; it appears by the auctioneer's account that I have received 75*l.* 8*s.* on account of the bankrupt.—When was that sum received?—About the 10th of February last." It appeared also by other questions that the bankrupt was rendered to the custody of the Marshal, in two actions, on the 26th of January preceding, and that the defendant then knew him to be in insolvent circumstances. No question was put as to the manner in which the money, so received on account of the bankrupt, had been disposed of. The act of bankruptcy on which the commission issued was lying in prison twenty-one days from the render before mentioned. The Lord Chief Justice thought this evidence did not prove an account stated, and directed a nonsuit.

Pollard now moved for a rule nisi to set aside the nonsuit, and cited *Kewley v. Michel* (a) and *Higmore v. Primrose* (b).

BAYLEY J. The present case is clearly distinguishable from those which have been cited. In each of

(a) 15 *Bur.* 242.(b) 5 *M. & S.* 62.

them there was an admission of a subsisting debt, and that was evidence of an account stated. These the defendant merely admitted that at a certain time he received a sum of money, and not that it was a subsisting debt payable to the assignees. I think, therefore, that the verdict was right.

1828.

TOOKER
against
BARNES.

ROBERT OF CARSHAMPTON, and of the same opinion; and further I am disposed to say that an admission of a debt under a compulsory examination is not evidence of a debt stated. The defendant never accounted with the plaintiff; but, under compulsion, made a disclosure to the commissioners.

Where a parol agreement was made between A. and B., that the former should let, and the latter take, certain premises, upon the terms and conditions contained in a lease of the same premises granted by A. to C.: Held, that in an action by A. against B. for rent and non-repair, the lease could not be read in evidence, unless duly stamped.

Thursday, January 24th

AGREEMENT on a special agreement for rent of a house in premises, and for not repairing them. Plea,

the general issue: as the arbitrators Lord Mansfield

C. J. at the London sittings after last Michaelmas term, it appeared that one West had been tenant to the plaintiff

under the premises, in question; and in June 1821, the

plaintiff and defendant agreed by parol, that the latter should become tenant of the premises upon the terms

and conditions contained in a written agreement between the plaintiff and West. This agreement was produced,

and was stamped as an agreement; it was in effect a lease to West; whereupon it was objected, for the de-

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S s

fendant,

Where a parol agreement was made between A. and B., that the former should let, and the latter take, certain premises, upon the terms and conditions contained in a lease of the same premises granted by A. to C.: Held, that in an action by A. against B. for rent and non-repair, the lease could not be read in evidence, unless duly stamped.

1828.

TURNER
against
POWER.

pendant, that it could not be read in evidence, not having a lease stamp. The Lord Chief Justice being of that opinion, directed a nonsuit.

Gurney now moved for a new trial, and contended that as the written instrument was not signed by either the plaintiff or defendant as an agreement to bind them, it did not require any stamp. Their agreement was merely by parol, and this document was referred to in order to settle the terms of that parol agreement. The case, then, was similar to that of *Drant v. Brown (a)*, where an agreement was made by parol to abide by the terms of a written document; and that was received in evidence without a stamp.

Per Curiam. The document referred to in that case was merely a proposal, and not an agreement. The document here produced was a lease, and the statute provides that no lease, where the rent exceeds 20*l.*, and is under 100*l.*, as in this case, shall be received in evidence without a stamp of 1*l.* 10*s.* The evidence was, therefore, properly rejected, and there is no ground for setting aside the nonsuit.

Rule refused.

(a) 3 B. & C. 665.

1828.

BENNETT *against* WOMACK.*Friday,
January 25th.*

ASSUMPSIT on an agreement to purchase the lease of a public-house, which in the agreement was described as held by the plaintiff at a certain net annual rent under common and usual covenants. Plea, the general issue. At the trial before Lord *Tenterden* C. J. at the *London* sittings after last *Michaelmas* term, it appeared that the defendant had entered into the agreement set out in the declaration, but the lease contained a covenant by the tenant to pay the land-tax, sewers-rate, and all taxes, besides the rent specified, and a proviso for re-entry by the landlord if any business but that of a victualler should be carried on in the house; and these the defendant's counsel contended were not common and usual covenants, wherefore he was not bound to take the lease. The Lord Chief Justice thought that the stipulation for a net annual rent answered the objection as to the land-tax and sewers-rate; and evidence being given that the proviso for re-entry was inserted in at least six out of ten leases of public-houses, his Lordship thought it must, with reference to the lease in question, be considered as common and usual, and directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

F. Kelly now moved accordingly, and contended that a covenant to pay the land-tax and sewers-rate was not a common covenant, for that the former was always considered a landlord's tax, and under the statute of

A party contracted for an assignment of a lease of a public house, which was described as holden at a certain net rent, upon usual and common covenants. The lease contained a covenant by the tenant to pay land-tax, sewers-rate, and all other taxes, and a proviso for re-entry, if any business but that of a victualler should be carried on in the house, and it was proved that a considerable majority of public house leases contained such a proviso: Held, that the covenant to pay land-tax, &c. was a common covenant in a lease, reserving a net rent; and that the proviso for re-entry must, with reference to a lease of a public house, also be considered usual and common.

1828.

—
 BENNETT
 against
 WOMACK.

sewers the rate is sometimes imposed on the landlord, sometimes on the tenant, and sometimes on both. Neither was the proviso against carrying on any business in the premises, except that of a victualler, a common stipulation. The fact of such a proviso being frequently introduced into such leases makes no difference. In *Henderson v. Hay* (a), the assignee of a lease of a public-house agreed for a new lease "upon common and usual covenants." The lessor afterwards insisted upon a covenant not to assign without his licence, but Lord *Thurlow* decreed a specific performance without such covenant, observing that although it might be very usual to introduce it, that would not make it a common covenant. This was confirmed by Lord *Eldon*, after much consideration, in *Church v. Brown* (b), where his Lordship said, "the safest rule of property is, that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make, and that nothing which flows out of that interest as an incident, is to be done away by loose expressions, to be construed by facts more loose." Now one of the rights which the defendant would take as incident to his interest for a term of years, would be the right to carry on any lawful trade on the premises. (c)

Lord TENTERDEN C. J. I am of opinion that there is not any weight in the objection taken to the covenant to pay the land-tax and sewers-rate. When a party

(a) 3 Br. Ch. Ca. 632.

(b) 1 Ves. 258.

(c) See many cases on this subject collected in a note to *Henderson v. Hay*, 3 Br. C. C. by *Eden*.

stipulates

stipulates to receive a net rent, that means a rent clear of all deductions to which it would otherwise be liable; the covenant to pay land-tax and sewers-rate, must, therefore, be an usual covenant in a lease reserving a certain net rent. The remaining question turns upon the proviso for reentry. Now that which is usual in leases of one description of property, may not be so in leases of another, and I therefore think we are bound to take into consideration that this was a lease of a public-house. Evidence was given, that of such leases at least six in ten contained a similar proviso; and as no attempt was made to answer that by conflicting evidence, it must be taken that such a proviso was usual and common in leases of public-houses. And if there was nothing in this lease more than the party contracting for the purchase must be presumed to have expected to find there, the existence of the proviso furnishes him with no valid ground for refusing to complete his contract.

1828.

 BENNETT
 against
 WOMACE.

BAYLEY J. I entirely agree upon both points. Where a tenant agrees to give a net rent, covenants to secure that are usual and common. Now the covenant to pay sewers-rate is merely a covenant to secure a net rent to the landlord. With respect to the other objection, it must be remembered that this was a bargain for an assignment of a lease, not for the original grant of a lease; the defendant was told that it contained none but usual and common covenants, and I think that was made out by evidence, that of such leases six in ten contained the proviso in question.

HOLROYD and LITLEDALE Js. concurred.

Rule refused.

1828.

Friday,
January 25th.

The KING *against* The Mayor, Aldermen, and
Capital Burgesses of the Borough of DON-
CASTER.

By custom, in a corporate town, all persons having served an apprenticeship for seven years to a free burgess carrying on trade there, were entitled to be admitted to the office of free burgess: Held, that a person who had served under articles of clerkship to an attorney, a free burgess of the borough, and residing within the same, was not entitled to be admitted to his freedom.

A RULE nisi had been obtained for a mandamus to the mayor, aldermen, and capital burgesses of the borough of *Doncaster*, commanding them to admit and swear *J. Buckland* into the place and office of a freeman or burgess of the said borough, on the ground that he had been bound by an indenture of apprenticeship, or articles of clerkship, to be the apprentice or clerk of an attorney (who was a freeman or free burgess of the borough, residing within the same), for seven years, to learn the business of an attorney, and that he served such attorney for that period within the borough, and that by usage, every person who had served an apprenticeship to any trade or profession, was entitled of right to be admitted a free burgess. It appeared by the affidavits, in answer to the rule, that the corporation was created by charter, by which it was granted that the burgesses, tenants, residents, and inhabitants, should be free burgesses, and have a guild merchant; that there were guilds of taylor, butchers, weavers, cordwainers, glovers, woollen weavers, of fullers and dyers, tanners, skinner, joiners, drapers, fellmongers, and hat-makers, and that persons admitted to their freedom by reason of apprenticeship, had always served a person in some trade. There was no instance of any person having been admitted to the office of free burgess by reason of having served seven years as an apprentice or clerk to
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an attorney; and there were several instances of persons having been refused to be admitted as free burgesses, on the ground they had not served apprenticeship to a trade.

1828.

The King
against
The Mayor of
Doncaster.

The *Solicitor General* now shewed cause; and contended, first, that an articled clerk to an attorney was not an apprentice within the ordinary meaning of that term; and, secondly, that at all events the occupation of an attorney was a profession, and not a trade, and, consequently, that the party had no right to be admitted to his freedom.

The *Attorney General* admitted that he could not support the rule.

LORD TENTERDEN C. J. A person who serves an attorney under articles of clerkship, can hardly be said to be an apprentice within the popular meaning of that term. Here, however, the right to be admitted a free burgess by reason of having served an apprenticeship, is confined to such persons as have served an apprenticeship to a trade. An attorney exercises a profession, and not a trade. This rule must, therefore, be discharged.

Rule discharged.

1828.

Saturday,
January 26th.

Ex parte HORNE.

An act for making a navigable canal, provided that the shares were to be deemed personal estate, and to be transmissible as such. The canal passed through parishes in the diocese of Worcester, and other parishes in the diocese of Lichfield and Coventry. The transfers of shares in the canal were filed at the public office of the company in the diocese of Lichfield and Coventry, where the dividends were also paid and books of account kept: Held, that for the purposes of probate, the right of a shareholder to a share of the profits, being personal property, might be considered as locally situate in the diocese of Lichfield and Coventry, and that a probate granted by the Consistorial Court of the Bishop of that diocese was sufficient.

MARRYAT obtained a rule nisi for a mandamus to the Company of Proprietors of the *Worcester and Birmingham Canal Navigation*, and their clerk, to make in a book kept for that purpose, an entry of the probate of *William Horne*, deceased, granted by the Consistorial Court of the Lord Bishop of *Lichfield and Coventry*, and the name and place of abode of *Ann Horne*, as the owner, proprietor, or person entitled to one share in the profits of the said navigation, belonging to the said *William Horne* at the time of his death.

By an act of the 31 G. 3. entitled "An act for making a canal from *Birmingham* to communicate with the *Severn*, near *Worcester*," certain persons were incorporated, and were empowered to raise a competent sum of money for making the canal, not exceeding 180,000*l.*, which said sum was to be divided into 1800 equal shares, and the "*said shares were to be deemed personal estate, and transmissible as such, and not in the nature of real estate.*" By a subsequent act (48 G. 3. c. 49.), the original deeds of bargain and sale or transfer of any shares in the navigation were required to be filed with and kept for the use of the company, and the company were authorized and required to nominate a clerk, who should, in a proper book provided for that purpose, enter and keep a true and perfect account of the names and places of abode of the several proprietors of the said navigation, and of the several persons who should from
time

time to time become owners and proprietors, or entitled to any share or shares therein.

The transfers of shares in the canal have been filed and kept by the clerk appointed for that purpose at the office in *Birmingham*, where, also, the dividends have been and are paid, the books of account kept, and the general business transacted. The canal passes through several parishes in the diocese of *Worcester*, through the parish of *Edgbaston*, a peculiar of the dean and chapter of *Litchfield*, and through the parish of *Birmingham*, which is in the diocese of *Litchfield* and *Coventry*, and the rates and duties for tonnage and wharfage are collected at different places in each of the said dioceses. *William Horne* died at *Birmingham* in *March* 1819, possessed of a 100*l.* share, the transfer of which had been regularly filed in the company's office at *Birmingham*; by his will he gave all his personal estate to his wife *Ann Horne*, and appointed her sole executrix, and she proved the will in the Consistory Court of the bishop of *Litchfield* and *Coventry*; the company refused to pay her the dividends upon this share, and to register the probate, and enter her name and abode as a proprietor, on the ground that the probate of the Consistory Court was not sufficient, but that she ought to have taken out a prerogative probate.

Holroyd shewed cause. The canal extends through several different dioceses, and the interest of the testator, if it has any locality, must be considered as being in each diocese through which the canal passes, and there should be a probate in each diocese, or a prerogative probate. An annuity issuing out of land is bona notabilia where the land lies, *Com. Dig., Administration Q.*

This

1828.

Ex parte
Horne.

1828.

Ex parte
HORN.

This is an interest of the same description; but if it has no defined locality, then a prerogative probate is necessary. In the case of stock and money in the funds, it was said by the Lord Chief Baron, in *The King v. Capper (a)*, that it has no defined locality, and for the purpose of probate or administration is within the province of *Canterbury*. In the case of *Smith v. Stafford (b)*, there was a prerogative probate, and that is sufficient.

Marryat, Parke, and Whateley contra. The interest of the testator is as distinct from that of the body corporate, of which he was a member, as the interest of one private individual is from that of another. The body corporate has lands in different dioceses; the individual members have no interest in those lands; all that each proprietor is entitled to under the private act of parliament, 31 G. 3. c. 59. is, "the value and not distribution of a certain part of the profits and advantages that should arise and accrue by virtue of the several sums of money raised under that act." These net profits are ascertained at the head office; and until that is done, the proprietor has no claim: they are payable there, and the share is transferred there only, and the deed by which the testator acquired his title remains there, and was there at the time of his death. This is like the case of stock transferable at the Bank of *England*, where a *London* probate is deemed sufficient. In *Smith v. Stafford (c)*, the canal extended into two provinces, and the prerogative probate in one province, where the head office was situate, was deemed sufficient.

(a) 5 Price, 217.

(b) 2 Wils. Ch. Ca. 166.

Per Curiam. The right to the share of the profits is personal property, which may be considered as locally situated in *Birmingham* for the purposes of probate.

1828.

Ex parte
Horne.

Rule absolute.

Willoughby v. Greenhouse 3 ad. 111. M. 316.

GREENSLADE *against* DOWER and COLMAN.

Saturday,
January 26th.

ASSUMPSIT against the defendants as acceptors of several bills of exchange payable at six and twelve months, drawn by one *Willoughby*, and endorsed by him to the plaintiff. Plea, non assumpsit. At the trial before Lord *Tenterden* C. J., at the *Westminster* sittings, after last *Michaelmas* term, it appeared that *Willoughby*, in *October* 1824, was the occupier of a farm in *Surrey*, under an agreement for a lease from Lord *King*. On the 10th of *October* in that year, an agreement was entered into between *Willoughby* and the defendant *Coleman*, that he should take the farm upon the terms of *Willoughby's* agreement with the landlord, and pay for fixtures, household furniture, crops, stock, &c., at a valuation. On the 11th, a written agreement to that effect was prepared and signed by *Willoughby* and *Coleman*; on the next day, *Dower* also signed it. According to this agreement, the amount of the fixtures and furniture was to be paid for on the 25th of *October*, the price of the crops and stock by bills at three months. A few days after this agreement was signed, *Coleman* was taken very ill, and so continued, wholly unable to attend to business, for several months. In consequence of this *Willoughby*, at the request of *Dower*, continued to manage the farm until the 9th of *De-*

Where *A.* and *B.* agreed to take a farm, and pay *C.*, the former occupier, for certain articles, by bills at three months, and *C.* afterwards, without the knowledge or consent of *A.*, took from *B.* bills for the amount payable at six and twelve months, accepted by himself in his own name and *A.'s*: Held, that the latter could not be sued on the bills.

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1828.

GREENSLADE
against
DOWER.

December 1824, when *Dower* entered into a new agreement with *Willoughby*, to pay part of the sum at which the articles specified in the former agreement were valued, in cash, and the remainder by bills at six and twelve months. In pursuance of this agreement, the bills in question were drawn by *Willoughby*, accepted by *Dower*, for himself and *Coleman*, and deposited in the hands of the auctioneer employed to make the valuation; to be kept by him until the valuation was formally made out, and possession of the farm given up. On the 11th of January 1825 this was done; *Dower* took possession of the farm, and the bills were handed over to *Willoughby*. In April 1825, *Coleman*, having recovered from his illness, went to reside on the farm, and was then for the first time informed by the auctioneer that the amount had been paid by *Dower*, partly in cash and partly by bills, but the periods at which the bills were made payable were not mentioned. *Coleman* replied, that *Dower* ought not to have given any bills, as he had received 1200*l.* to make the payment, which sum greatly exceeded the amount of the valuation. It further appeared that *Dower* and *Coleman* were jointly interested in the farm. For the defendant *Coleman* it was objected, that *Dower* had not any authority to accept the bills in question in their joint names. The Lord Chief Justice thought the objection fatal, and directed a nonsuit.

Brougham now moved for a rule nisi for a new trial. It was clear upon the evidence that *Dower* and *Coleman* were partners in the farm. *Coleman*, it is true, originally made an agreement, and signed the written contract for the farm, but on the following day this was also signed by *Dower*, and it was not disputed that the latter

latter was to have an interest in the concern. If then they were partners, the acceptance of one bound both, the bills being given for a debt due from both. It may be said that the power of one partner to bind a firm by his acceptance, applies only to trading partnerships; but there is no authority for that, and it would be a very inconvenient limitation of the implied power given by one partner to another. Besides, even when *Coleman* was informed that bills had been given, he did not deny his liability, or make any communication upon the subject to *Willoughby*, but continued to occupy the farm jointly with *Dower* as before. His conduct, therefore, amounted to a recognition of the authority.

1828.

GREENSLADE
against
DOWER.

Lord TENTERDEN C. J. The agreement signed by *Coleman* was, that the amount of the valuation should be paid partly in cash and partly by bills at a certain date; and the only question is, Whether *Coleman* ever authorized *Dower* to pay by bills at a longer date? *Willoughby* knew the terms of the original agreement, and as he with that information took bills not drawn according to those terms, he took them at his own peril. No express authority was given, and in the month of *April*, when *Coleman* was told that some bills had been given, but the particulars of which were not even then mentioned, he replied, that none ought to have been given, for *Dower* had been supplied with cash sufficient to pay the whole sum. This, certainly, was nothing like a ratification of *Dower's* act; and I think that the mere joint occupation of the farm cannot operate by relation, so as to render these bills binding upon *Coleman*, they having been given contrary to the terms of the original contract, and without his assent. The
nonsuit,

1828. nonsuit, therefore, appears to have proceeded upon a correct view of the case, and ought not to be disturbed.

GREENGLADE,
against
DOWER.

BAYLEY J. I should have thought the case more free from difficulty, had *Coleman*, immediately on being informed that the bills had been given, communicated to *Willoughby* that *Dower* acted without authority; but, upon the whole, I think that the nonsuit was right. The question is not, whether *Willoughby* shall lose his money, for he may still sue both the defendants, provided he has done nothing to destroy his original right of action against them; but the question is, Whether an action can be maintained on these bills? In order to decide that, we must see whether *Dower* had any authority to bind *Coleman* express or by operation of law, resulting from the situation of the parties. If several persons are in trade together, a bill accepted by one in the names of the partnership, and in the course of their trading, binds them all. But there is a great difference between such a bill, and one drawn for the purpose of founding the partnership. Originally each partner would have to bring in his proportion of the capital, and it would be very unjust to let the acceptance of one for the capital bind all the others: no authority of that nature can be implied, nor does it arise by operation of law, the debt not being a partnership debt. Then, was there any express authority in the present case? The contrary appeared. The authority given was to accept bills payable at three months; those in question were accepted at six and twelve. We should facilitate the practising of frauds by means of collusion between creditors, and one of several joint debtors, if we held that this was a transaction within the authority given.

HOLROYD

HOLROYD J. I am of opinion that the nonsuit was right. *Dover* had no authority in law to accept these bills for the original purchase of the stock on the farm. The transaction was not a matter of trade, and did not warrant the acceptance without express authority.

1828.

Memorandum
against
Dover.

LITLEDALE J. concurred.

Rule refused.

- *Dogden v. Frankis* - v. *Frankis* 1828 127
- *Blackwell* - v. *McNaughton* 1828 127
- *Marshall* - v. *Rowell* 9-28-779
MULLETT against HUCHISON.
- *Notley* - v. *W. B. C. B.* 1824
Monday,
January 28th.

ASSUMPSIT in consideration that the plaintiff at the request of the defendant, would indorse and deliver to the defendant three bills of exchange (therein particularly described) to be got discounted by him, defendant, for the plaintiff, for reward and interest to the defendant in that behalf; he, the defendant, undertook and promised the plaintiff to get the said bill discounted for the plaintiff, or else to return the same on demand to the plaintiff. Averment, that the bills were delivered to the defendant, but that he did not get them discounted, nor return the same when requested by the plaintiff. Plea, non-assumpsit. At the trial before Lord Tenterden C. J. at the *London* sittings after last *Michaelmas* term, the following unstamped memorandum in writing, signed by the defendant, and addressed to the plaintiff, was offered in evidence on behalf of the plaintiff: "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand." It was objected, that this paper was not admissible in evidence for want

In an action for not returning bills deposited with defendant, the following unstamped memorandum, signed by defendant, was held to be admissible in evidence: "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand."

of

1828.

MULLETT
against
HUGHESON.

of a stamp, but the Lord Chief Justice overruled the objection, and the plaintiff had a verdict.

F. Kelly now moved for a new trial. This paper "was evidence of a contract," and therefore required a stamp by the 55 G. 3. c. 184. Sched. Pt. 1. *Tomkins v. Ashby* (a) only shewed that it did not require a receipt stamp. The same point is now pending before the Court in *Langdon v. Wilson* (b).

Lord

(a) 6 B. & C. 541.

(b) This case has since been disposed of. It was as follows: —

Assumpit, in consideration that the plaintiff would retain and employ defendant as his attorney, and would deliver to the defendant a certain bill of exchange, drawn by *W. Patterson* upon, and accepted by, *Thomas Harrison*, for the payment of 300*l.* at six months after the date thereof, and indorsed by one *Sir Paul Bagot* to the plaintiff, in order that he, the defendant, might recover the amount of the said bill from the respective parties liable to pay the same to the plaintiff, or make such other arrangement for the benefit of the plaintiff as might appear to him, the defendant, in his professional capacity, reasonable and proper, defendant undertook, &c. to do and perform his duty as such attorney, and to use and employ reasonable and proper care and diligence in and about the endeavouring to recover the amount of the bill, and to re-deliver the bill to the plaintiff. Averment of the delivery of the bill to the defendant. Breach, that he did not use reasonable diligence to recover the amount, nor make any arrangement for the benefit of the plaintiff, nor re-deliver the same. The declaration also contained a count charging the defendant as indorser of the bill. At the trial before Lord *Tenterden* C. J. at the *Middlesex* sittings after last *Trinity* term, the plaintiff gave in evidence the following letter, signed by the defendant, and addressed by him to the plaintiff: — "I have this day received a bill of exchange for 300*l.*, drawn by one *Patterson* upon *Thomas Harrison*, bearing my indorsement and the indorsement of *Sir Paul Bagot*, which I hold, as your attorney, to recover the value of from the respective parties, or to make such other arrangement for your benefit as may appear to me, in my professional capacity, reasonable and proper. 15th Nov. 1825." It was contended that this letter was not receivable in evidence for want of a stamp; but the Lord Chief Justice overruled the objection, and a verdict was found for the plaintiff on the count

LORD TENTERDEN C. J. I am of opinion that this paper did not require any stamp. If *Huchison* had bound himself absolutely by it to get the bills discounted, it might then have required a stamp, because in that case it would be evidence of a contract by him to do something which he otherwise would not be bound to do. But by this instrument he binds himself only to return the bills on demand. He therefore makes no other contract than that which the law implies in every case of a mere deposit of bills.

1828.

MULLERT
against
HUCHISON.

BAYLEY J. This instrument contains a mere acknowledgment by *Huchison*, that he holds the bills for

count on the bill. A rule nisi for a new trial was obtained by *Campbell* in last *Michaelmas* term, upon the ground that this paper was not admissible in evidence for want of a stamp; and that, without it, there was not evidence that the defendant had notice of the dishonor, so as to entitle the plaintiff to recover on the count on the bill.

Sir J. Scarlett and Comyn now shewed cause. This paper did not require a stamp; it was a mere acknowledgment of the purpose for which the defendant received the bill, and contained, on his part, no other contract than that which the law will imply. *Watkins v. Hewlett* (1 Brod. & Bing. 1.), shews that it did not require an agreement stamp, and *Temkins v. Ashby* (6 B. & C. 541.), that it did not require a receipt stamp. They also cited *Chadwick v. Sills* (1 Ryan & Moody, 15).

Campbell and *Patteson* contra. This instrument, though signed only by one of the parties, is evidence of a contract. It would have proved the contract set out in the first count of the declaration; and, therefore, required a stamp.

LORD TENTERDEN C. J. I am clearly of opinion that this paper was not evidence of a contract within the meaning of the 55 G. 3. c. 184. Sched. Pt. 1. It was a mere acknowledgment of the duty which the party took upon himself to perform.

Rule discharged.

1828.
 ———
 MULLETT
 against
 HUCHISON.

a particular purpose. *Tomkins v. Ashby* (a) is in point. There an unstamped paper containing an acknowledgment by the defendant, that the plaintiff had deposited money in his hands, was held to be receivable in evidence.

HOLROYD and LITLEDALE Js. concurred.

Rule refused.

(a) 6 B. & C. 541.

RULE OF COURT.

Hilary Term, 8th and 9th Sep. 4

WHEREAS great expense is often unnecessarily incurred in making up demurrer books, from setting forth those parts of the pleadings to which the demurrers do not apply. IT IS THEREFORE ORDERED, that from and after the end of this term, when there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates shall be copied into the demurrer books; and if any other parts shall be copied, the Master shall not allow the costs thereof on taxation, either as between party and party, or as between attorney and client.

By the Court.

1828.

DOE on the demise of JOHN BYWATER *against*
CHARLES JOHN BRANDLING, W. B. C. STAND-
RIDGE, and J. DIXON.

EJECTMENT to recover certain messuages, lands,
and premises in the parishes of *Leeds* and *Hunslet*,
in the West Riding of the county of *York*. At the trial
before *Bayley J.*, at the *York* Spring assizes 1826, a ver-
dict was found for the plaintiff, subject to the opinion of
this Court on the following case:—

Elizabeth Bywater being seised in fee of an estate near
Leeds, in the county of *York*, of which the premises in
question formed part, by indenture dated the 1st of
August 1758, and expressed to be made by virtue and
in pursuance and under the authority and direction of
an act of parliament of the 31 G. 2., between the said
Elizabeth Bywater of the one part, and one *Charles*
Brandling, Esq. since deceased, of the other part, in

In construing
acts of parlia-
ment, the Court
must take into
consideration
not only the
language of the
preamble, or
of any par-
ticular clause,
but of the whole
act; and if in
some of the
enacting
clauses ex-
pressions are
found of more
extensive im-
port than in
others, or than
in the pres-
b'e, the Court
will give effect
to those more
extensive ex-
pressions, if,
upon a view

of the whole act, it appears to have been the intention of the legislature that they should
have effect.

Upon this ground, where a lease of certain waggon-ways was granted to *A. B.* under
the authority of an act of parliament, in which, as well as in the lease, there was a proviso
for re-entry, in case he neglected in any one year to bring a certain quantity of coals
to *C.* for the use of the inhabitants of *L.*, and sell them there at a certain price; and
by a subsequent act, the preamble of which recited that the price was inadequate, and
that the inhabitants of *L.* would sustain great inconvenience if *A. B.* ceased to supply
them with coals, it was enacted, first, that the former act, confirming the lease (except such
parts as were thereby altered or repealed), should continue; then, that *A. B.* might sell his
coals brought to and deposited at *C.*, or at any other place near thereto, to be used as a repository
for coals instead thereof, at a certain increased price; and another section provided, that if
A. B. neglected to bring the stipulated quantity of coals to *C.*, or to such other place near
thereto, to be used as a repository for coals instead thereof, and sell them there at the price
fixed by that act, his interest in the waggon-ways should cease: Held, that although the
preamble did not recite an intention to give *A. B.* liberty to change the place used as a
repository for coals, and although it was not expressly enacted that he might do so, yet
that the intention of the legislature to give him that privilege was clear, and that he might
do so without forfeiting his interest in the waggon-ways.

1828.

—
 DOR dem.
 BYWATER
 against
 BRANDLING.

consideration of the yearly rent and covenants therein after reserved and contained, on the part and behalf of *C. Brandling*, his executors, administrators, and assigns, to be paid and performed, granted, demised, and leased to *C. Brandling*, his executors, &c. two closes or parcels of land in the indenture described, and which were the premises sought to be recovered in this action; and also a certain stable or helm therein mentioned, and also full and free liberty, power, and authority to him *C. Brandling*, his executors, &c. to make, lay, and place such waggon-way or road, waggon-ways or roads as were then commonly made use of for and about the coal-mines and coal-works in the counties of *Durham* and *Northumberland*, and such branches from the same in, upon, over, and through the said parcels of ground thereby leased, or any part or parts thereof, as should be proper and necessary for the carriage and conveyance of coals from the coal-mines or coal-works of him *C. Brandling*, within the manor of *Middleton* or elsewhere, to *Casson Close*, near *Leeds Bridge*; which said place called *Casson Close*, was and is mentioned in the said act of parliament of the 31 G. 2. as a coal-yard, or repository for coals to be brought from the said coal-mines or coal-works for the purposes in the said act mentioned; and also full and free liberty, power, and authority for him *C. Brandling*, his executors, &c. by and with workmen, servants, horses, and carriages, to break, cut, dig, and remove the soil of any part or parts of the said closes or parcels of ground, and to carry, convey, fix, lay, and place wood, timber, iron rails, &c. and other materials unto, in, and upon the said closes or parcels of ground, or any part or parts thereof; and also to cut and make any trench or trenches, bridge or bridges,

bridges, and to do all other acts and things necessary or convenient, as well for the making, laying, and placing the said waggon-way or ways, and branches, as for the repairing and keeping the same in good order from time to time, as occasion should require; and also full liberty, power, and authority for him *C. Brandling*, his executors, &c. and his and their servants, agents, and workmen, and other persons by him and them employed, to go, pass, and repass in, upon, and along the waggon-way or ways, and branches so to be made as aforesaid, with horses or other beasts of burthen, or draught waggons and other carriages loaden or unloaden: habendum the same unto *C. Brandling*, his executors, &c. from the 1st day of *May* 1758, for and during the term of sixty years, fully to be complete and ended, and for such further term or longer time as the said coal-works, collieries, or coal-mines then belonging to him *C. Brandling*, or any other coal-works, collieries, or coal-mines whereof or wherein he, his executors, or administrators should during such term of years be seised, possessed, or interested, within the manor of *Middleton*, or elsewhere, should continue to be used and wrought; yielding and paying therefore yearly and every year during the term thereby granted for the said waggon-way or ways, and the liberty and privilege of making, using, and continuing the same, the yearly rent of 2*l.*, and for the rest of the closes, lands, and grounds the sum of 11*l.* The lease contained the following proviso: "Provided also, that in case *C. Brandling*, his heirs, or assigns, shall cease and leave off to work the said collieries or coal-works, or the same shall by means of fire or water, or by any other inevitable accident

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Doz dem.
 BTWATER
 against
 BRANDLING.

1828.

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 against
 BRANDLING.

accident fail or become incapable to be wrought, or in case *C. Brandling*, or any other owner or proprietor thereof for the time being, shall refuse or neglect in any one year to bring or cause to be brought to the repository or coal-yard aforesaid, such quantity of coals, (unless prevented by fire, water, or other inevitable accident,) or to sell and dispose thereof at such rates and prices, and for such purposes as in and by the said act of parliament is in that behalf mentioned, provided, and appointed; then and in any of the said cases, it shall be lawful for the said *E. Bywater*, her heirs, &c. to enter into and upon the premises hereby leased, and then and also the estate, right, title, and privilege of him *C. Brandling*, his executors, &c. of and in the same, shall in that case and from thenceforth cease, determine, and be void." The lease also contained a covenant by the lessee for the payment of the rents, and covenants by the lessor, for quiet enjoyment on payment of the rent and performance of the covenants, conditions, and agreements which by the tenor, purport, and true intent and meaning of the said act of parliament, and the said indenture, were to be kept on the part of the lessee. The land demised consisted of four acres, or thereabouts. *E. Bywater* died seised in fee of the reversion of the demised premises in 1760, and by her will (after a devise of an estate for life to her uncle *John Bywater*), devised the reversion to her cousin *C. Bywater*, in fee, who survived the testatrix, and died seised in fee of the reversion, having by his will devised the reversion to his brother, *J. Bywater*, for life, and from and after the decease of his said brother *John*, to the heirs of the body of his said brother *John* lawfully to be begotten. *J. Bywater*, the devisee,

devisee, survived his brother, *C. Bywater*, and died in 1824, and the lessor of the plaintiff is his eldest son.

1828.

DOX dem.
BYWATER
against
BRANDLING.

C. Brandling, the lessee, entered into, and was possessed of the demised premises under the lease of 1758, and *C. J. Brandling* (one of the defendants) on the day of the demise, laid in the ejectment, and, also, at the time of the commencement of this action, had succeeded his father as the owner and proprietor of the collieries or coal-works mentioned in the lease, and, together with the other defendants, as his under-tenants, was in possession of the premises demised. The term of sixty years mentioned in the lease expired on the 1st May 1818. No coals whatever have been brought to the repository or coal-yard in *Casson Close*, mentioned in the said proviso, since December 1816, and *Casson Close* ever since has been, and is now, disused as a repository for coals; the collieries have been ever since, and still are, regularly used and wrought, and no accident, either from fire or water, nor any other inevitable accident, has prevented the coals procured from the collieries from being brought to the repository or coal-yard in *Casson Close*; but Mr. *Brandling*, in 1816, determined his contract with the proprietors of *Casson Close* by surrendering his term in the lease thereof for a valuable consideration. Up to December 1816 Mr. *Brandling* delivered at the repository in *Casson Close* the quantity of coals mentioned in the various acts of parliament of 31 G. 2., 19 G. 3. c. 11. 86., 33 G. 3. and 43 G. 3. c. 12. (a),
and

(a) The 31 G. 2. entitled "An act for establishing agreements made between *Charles Brandling*, Esq. and other persons, proprietors of land, for laying down a waggon-way, in order for the better supplying the

1828,

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BYWATER
against
BRANDLING,

and sold them there according to the directions of those acts. In December 1816 he discontinued the staith in *Casson Close*, and made a new repository for coals at a place

town and neighbourhood of *Leeds*, in the county of *West*, with coals," began by reciting, that

Charles Brandling, Esq. lord of the manor of *Middleton*, in the county of *York*, was owner and proprietor of divers coal-works, mines, veins, and seams of coals lying and being within the said manor of *Middleton*, and places adjacent; and had proposed and was willing to engage and undertake to furnish and supply the inhabitants of the town of *Leeds* with a certain quantity of coals at a certain price, for the term of sixty years, to commence from the 2d day of *January* 1758, and for such farther term or longer time as the said mines or any of them should continue to be used and wrought; and at his own charge and expence to carry and convey, or cause to be carried and conveyed from his said coal-works yearly and every year, 20,000 dozen, or 240,000 corves of coals at the least; and to lay up and deposit such coals, or cause the same to be laid up and deposited upon a certain field or open place called *Casson Close*, near the great bridge at *Leeds*, in order to be there sold and delivered at the rate, or price, aforesaid, unto the inhabitants of the said town of *Leeds*, or to such other persons as should purchase the same; that it was necessary to have a rail-road from the coal-works to *Casson Close*, in, over, and through divers fields, lands, and grounds in the parish of *Leeds*, which belonged to and were the estate and property of divers persons, the several owners and occupiers whereof had consented and agreed that the said *Charles Brandling*, his executors, &c. should and might make such rail-road over their lands; but as some of the owners and proprietors of the lands and grounds so to be used and employed for the said waggon-way and purposes thereinbefore mentioned, might happen to have only a limited and not an absolute interest and property therein, and might be under other disabilities to assure to the said *Charles Brandling* and his assigns the enjoyment of the said powers, liberties, and privileges necessary to render the said agreement effectual for the purposes aforesaid, without the aid and authority of an act of parliament: it was therefore enacted, that it should be lawful for the said *C. Brandling*, his executors, &c. at any time or times after the 1st *May* 1758, to make, lay, and place such waggon-way or road as aforesaid, and such branches, &c. as should be proper or necessary for the carriage and conveyance of coals with horses, &c. from any of the said coal-mines or coal-works of him the said *C. Brandling*, to the said repository or coal-yard in *Casson Close* aforesaid, as the said

C. Brandling,

place adjoining *Casson Close*, and has ever since used that place as a repository for coals, instead of *Casson Close*, and has supplied at the new repository, and has sold

1828.

Deu dem.
By water
against
Branford.

C. Brandling, his executors, administrators, or assigns should think fit and convenient; and that he the said *C. Brandling*, his executors, &c. should and might have, hold, use, exercise, and enjoy the said waggon-way or ways and branches, and all and every the powers, liberties, privileges, and premises thereby given and granted to and vested in him as aforesaid, from the said 1st day of *May*, for and during the term of sixty years from thence next ensuing, and fully to be complete and ended; and for such further term or longer time as the said coal-works, collieries, or coal-mines then belonging to him *C. Brandling*, or any other coal-works, collieries, or coal-mines whereof or wherein he, his executors or administrators, should during the said term of years or longer time be seised, possessed, or interested within the said manor of *Middleton* or elsewhere, should continue to be used and wrought, he *Brandling* paying the stipulated rent. By another clause, the several owners and proprietors of the lands and grounds in and upon which such waggon-way or ways should be made, were authorized and required by indenture or indentures under their respective hands and seals, to grant, lease, or demise such of the several fields, lands, wastes, and other grounds so belonging to them respectively; or the liberty and privileges of making, laying, placing, and continuing such waggon-way or ways in, upon, and over the same respectively, unto him *C. Brandling*, his executors, &c. for the said term of sixty years so commencing as aforesaid; and for such further term or longer time as such coal-works, collieries, or coal-mines within the said manor of *Middleton* or elsewhere as aforesaid, should continue to be used and wrought. The act, then, after declaring that the indentures should be enrolled in the register office at *Wakefield*, in *Yorkshire*, enacted, that the said grants, leases, and demises so made as aforesaid, should be as good, valid, and effectual in law, to all intents and purposes, as if the persons making the same were respectively seised in fee-simple of and in the lands and grounds thereof respectively to be granted, leased, or demised.

By another clause it was provided, that in case *C. Brandling*, his heirs, or assigns should cease or leave off to work the said collieries or coal-works aforesaid, or the same should fail, or become incapable to be wrought, by fire, water, or other inevitable accident; or in case the said *C. Brandling* or other owner for the time being should refuse or neglect in any one year, to bring or cause to be brought to the repository or coal-yard aforesaid,

1828.

Dox dem.
 BY WATER
 against
 BRANDLING.

sold there the quantity of coals prescribed by the statute of the 43 G. 3. c. 12. The new repository is about half-way between *Casson Close* and the premises in

aforesaid, the quantity of dozens of corves of coals thereinbefore mentioned, unless prevented by fire, water, or other inevitable accident; or should refuse to sell the same when brought down to the said coal-yard for the use of the inhabitants of *Leeds*, at the rates or price before mentioned, as by them respectively should be required, then in either of the said cases it should be lawful for the owners and proprietors of the several lands and grounds belonging to them respectively, which should be used for the purpose of such waggon-way or ways as aforesaid, to enter into and upon the several lands and grounds belonging to them respectively, which should be used and employed for the purpose of such waggon-way or ways as aforesaid; and then also all the estate, right, interest, and privilege of him the said *C. Brandling*, his executors, administrators, or assigns, of and in the same, should in that case and from thenceforth cease, determine, and be void.

The 19 G. 3. c. 11. entitled "An act for rendering more beneficial an act made in the 31st year of G. 2., entitled 'An act,' (setting out the title), required the owner of the colliery to bring 480,000 corves of coals to *Casson Close* in the year, and empowered him to sell the coals, which should be deposited in or upon the said repository at *Casson Close* aforesaid, unto the inhabitants of *Leeds*, or to such other persons as should purchase the same, at the rate and price of 5½d. per corf, any thing in the recited act, or in any of the leases granted in pursuance thereof, to the contrary notwithstanding; and contained a proviso for re-entry, similar to that in the former act.

This act contained a clause authorising the owner of the collieries to deliver 1000 dozen of corves of coals quarterly at any convenient place near or adjoining to the said waggon-way within the borough of *Leeds*, between the said coal-mines and the said repository in *Casson Close* aforesaid, and they were to be accounted as part of the said 40,000 dozens or 480,000 corves, which the owner of the mines was to bring down, or cause to be brought down, to the said repository in *Casson Close* aforesaid, and exposed to sale there.

The 33 G. 3. authorised the owner of the coal works in *Middleton* to sell and dispose of his coals, which should be deposited in or upon the said repository at *Casson Close* aforesaid, to the inhabitants of *Leeds*, at the price of 13s. 1d. for each and every waggon of coals, such waggon containing 24 corves, any thing in the said recited acts, or in any of the leases

or

in question, and upwards of 100 yards nearer the collieries, and further from the town than the old one was. Mr. *Brandling* continued to pay the rent reserved by

1828.

DOE dem.
BY WATTS
against
BRANDLING.

or agreements granted in pursuance thereof, to the contrary notwithstanding, and enacted that the right and interest of *C. Brandling*, his heirs, &c. in the said leases, should not cease and determine, but that he and they should continue to have the same interest therein, although the coals were sold at 15s. 7d. a waggon load as aforesaid; and it contained a clause of re-entry, adapted to the alteration of price. It also (s. 7.) authorized the lessee or owner of the mines to deliver, if required by any inhabitant of *Leeds*, at any convenient place or places near or adjoining to the said waggon-way within the parish of *Leeds*, between the said coal-works and the said repository in *Casson Close* aforesaid, any number of dozens of coals, not exceeding twelve waggons or 288 corves of coals in each day.

The 43 G. 3. c. 12., after reciting the former acts, proceeded as follows: "And whereas the inhabitants of the said town and parish of *Leeds* are very well satisfied and convinced, that on account of the advanced price of labour, and of the materials used in and about the said coal-works, and in the working thereof, and that as *C. J. Brandling*, Esq., the present owner of the said coal-works has been at a very great expense in making fresh winnings in the said coal-works, and in making and laying additional waggon-ways therefrom, the sum of 13s. 1d. for each and every waggon of coals containing twenty-four corves, each corf being in weight about 210 pounds, and in measure 7680 cubical inches, allowed to be demanded and taken by the last recited act, is not an adequate and sufficient price to be demanded and taken for the said coals so brought down, and delivered at the said repository at *Casson Close*; and that the said price is much lower than the price demanded and taken at all other coal-works in the neighbourhood: And whereas, if on account of the price or rate of the said coals, the said *C. J. Brandling* should discontinue and give up the said waggon-way or repository, it would materially injure the manufacturers of the said town and parish of *Leeds*; and be a cause of great distress to the inhabitants in general: And whereas the said *C. J. Brandling* cannot, without the aid and authority of parliament, sell and deliver his said coals at the said repository in the borough of *Leeds* at a higher price or rate than 6½d. a corf: May it therefore please your Majesty, that it may be enacted; and be it enacted, that the said recited acts, and all and every the rates, clauses, powers, agreements, penalties, forfeitures, rules, remedies, directions, payments, provisions, articles, mat-

ters

1823.

Don dem.
 BYWATER:
 against
 BRANDLING.

by the lease of 1758 to *John Bywater*, the father of the present lessor of the plaintiff, till *November 1823*, and, since that time, to the lessor of the plaintiff, who, upon its

ters and things whatsoever therein contained (except such parts of the same as may relate to any exemptions from stamp duties, and as are hereby varied, altered, or repealed), shall be, and the same are hereby declared to be in full force and effect from and after the passing of this act, during the continuance of the time or term granted by the said recited acts, for the purpose of carrying the said recited acts and this present act into execution, as fully, largely, and amply as if the same were repeated and re-enacted in the body of this present act."

Sect. 2. enacts, "That it shall and may be lawful to and for the said *C. J. Brandling*, his executors, administrators, or assigns, or any owner or owners, proprietor or proprietors of the said coal-works in *Middleton*, to sell and dispose of his and their coals which shall be deposited and laid up in or upon the said repository at *Casson Close* aforesaid, or at any other place near thereto, to be used as a repository for coals instead thereof, unto the inhabitants of the said town and parish of *Leeds*, at the rate and price of 16s. for each and every waggon of coals, such waggon containing twenty-four corves, each corf containing in weight about 210 pounds, and in measure 7680 cubical inches, any thing in the said recited acts, or in any of the leases or agreements granted in pursuance thereof, to the contrary notwithstanding; and that the right and interest of *C. J. Brandling*, his heirs, &c. in the said leases or agreements shall not cease and determine, but that he and they shall continue to have the same interest therein, although the said coals are sold at the said sum or price of 16s. a waggon load as aforesaid."

The third section prohibited the sale of coals brought down to or deposited in the said repository at *Casson Close* aforesaid, or in any other place near thereto, to be used as a repository for coals instead thereof, to any person but an inhabitant of *Leeds*.

The fourth section required *Mr. Brandling*, or other owner of the coal-works, to bring down to the said repository in *Casson Close*, or to some other place near thereto, to be used as a repository for coals instead thereof, six days in every week, eighty waggons, whereof not less than ten waggons should be laid down at the said repository, or at some place near thereto, to be used as a repository for coals instead thereof.

The sixth section enacted, that if *Mr. Brandling*, or other owner of the coal-works, should refuse or neglect to bring, or cause to be brought down to the said repository in *Casson Close*, or to such other place near thereto,

its being tendered, has refused to receive it. The lessor of the plaintiff gave to the defendant *C. J. Brandling* a notice to quit, which expired before the commencement of this ejectment, but he and the other defendants continue to hold, claiming under the lease of 1756 as a valid and continuing lease.

1828.

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 Dux dem.
 Bywater
 against
 Brandling.

Brougham for the plaintiff. First, the lease is void at common law for all the term beyond sixty years; for a lease for years must have a certain beginning and end, *Co. Litt.* 45 b.; *Bac. Abr. Lease* (L); *Com. Dig., Estate* (G 10). (This point was conceded on the part of the defendant.) That being so, the validity of

to be used as a repository for coals instead thereof, the aforesaid daily number of waggons or corves of coals from the coal-works in the manor of Middleton, unless hindered by fire, water, or other unavoidable accident, or should refuse to sell the said coals when so brought down to the said repository, or to some other place near thereto, to be used as a repository for coals instead thereof, or should refuse or neglect to lay down, or cause to be laid down, at the said repository, or at such other place near thereto, to be used as a repository for coals instead thereof, ten waggons for the inhabitants of Leeds, at 16s. per waggon, then, and in every such case, it should be lawful for the owners or proprietors of the several lands and grounds in, through, or over which any waggon-way or ways was or were laid or made for leading of coals from the said coal-works, and for each and every of them, to enter into and upon the several lands and grounds belonging to them respectively, which should be used for the purpose of such waggon-way or ways as aforesaid, and then, also, all the estate, right, interest, and privilege of him, C. J. Brandling, his heirs, &c. of and in the same, should, in that case, and from thenceforth, cease, determine, and be void."

Sect. 19. authorizes justices at quarter sessions to fix and ascertain the rates and prices to be demanded and taken for leading and carrying away coals from the said repository, or from any other place near thereto, to be used as a repository for coals instead thereof, to all and every part and parts of the said town and parish of *Leeds*.

the

1828.

DOX dem.
BYWATER
against
BRANDLING.

the lease, for any term beyond sixty years, must depend upon the acts of parliament; it is a mere creature of the legislature. Now the first act, 51 G. 2, contains a proviso that in case the owner or proprietor of the collieries shall refuse or neglect in any one year to bring, or cause to be brought to the repository or coal-yard aforesaid (viz., *Casson Close*) the specified quantity of coals, or refuse to sell the same at the stipulated prices to the inhabitants of *Leeds*; it shall be lawful for the owner of the lands used for the purpose of the waggon-way to re-enter, and then the estate, right, and interest of *C. Brandling* in the same shall end and determine. It is clear, therefore, that if the condition, for the breach of which the lessors by the said proviso are entitled to re-enter, has not been altered by the subsequent acts, the lease has determined, because the lessee has for one year neglected to bring, or cause to be brought, to the repository at *Casson Close* the specified quantity of coals. By the subsequent acts of the 19 G. 3. c. 11. and 33 G. 3. c. 86. the condition is altered as to the price; the lessee is authorized to receive a higher price for his coals, and each of those acts contains a provision that the right and interest of the said owner of the collieries, &c., in the said lease shall not cease and determine, but that he shall continue to have the same interest therein, *although the coals are sold at the increased price*; and the provisos for re-entry in those acts respectively are adapted to the alteration of price. But those acts do not authorize the lessee to deposit the coals at any other place than *Casson Close*; and, consequently, the depositing them at any other would be a breach of the condition contained in the original act, and

would

would operate as a forfeiture of the lease. The only question is, Whether the legislature has by the last act, 43 G. 3. c. 12., authorized the lessee to change the place of deposit, and enlarged in that respect the condition, for the breach of which the lease was to become void. All these acts having been passed to regulate the rights, first, of the owners of the land over which the waggon-ways were to pass; secondly, of the inhabitants of *Leeds*; and, thirdly, of Mr. *Brandling*, the lessee of the waggon-ways, they ought to be construed as one act, and the last act, the 43 G. 3., must be read as if all the clauses in the former acts were repeated in it, and it ought to be construed, as between these parties, in the same manner as a private conveyance, according to the intention of the parties. The preamble recites the titles of the three former acts, and that the inhabitants of *Leeds* were satisfied that the price allowed to be demanded was not an adequate price for the coals brought down and delivered at the said repository at *Casson Close*, and that if, on account of the then inadequate price of the coals, Mr. *Brandling* should discontinue and give up the said waggon-way or repository, it would be a cause of great distress to the inhabitants in general, and that Mr. *Brandling* could not, without the authority of parliament, sell and deliver his said coals, at the said repository in *Leeds*, at any higher price than 6*d.* a coal. Now, in this recital *Casson Close* is again mentioned as the repository, but it is not mentioned that any inconvenience had arisen from its being the repository, or that there was any intention of changing it. The only inconvenience to be remedied by the act, as far as it can be collected from this recital,

1828.

DOE dem.
BY WATER
against
BRANDLING.

1828.

Don dem.
By WATER
against
BRANDLING.

was the inadequate price paid for the coals. The first section then enacts, "that the said recited acts, and all and every the rates, clauses, powers, agreements, and forfeitures, therein contained, shall be, and the same are hereby declared to be in full force and effect, as fully, largely, and amply as if the same were repeated and re-enacted in the body of this present act." The clauses in the former acts which rendered the lease void, if the lessee did not deposit the coals at *Cusson Close*, must be considered as incorporated in this act. The first section, therefore, so far from showing any intention to relieve the lessee from the condition of depositing the coals at *Cusson Close* shows the contrary, because it incorporates the old condition. The second section then authorizes the lessee to sell and dispose of the coals deposited upon the said repository, at *Cusson Close*, or at any other place near thereto, so as to make a repository for coals instead thereof, at a price higher than that allowed by the former acts, and then enacts that the right and interest of the lessee in the coals shall not cease and determine, but shall continue, although the coals are sold at the increased price. This clause in express terms relieves the lessee from that part of the condition which requires him to sell the coals at the price allowed by the former acts, but it does not relieve him from the other part of the condition, which requires the coals to be deposited at *Cusson Close*. The condition, therefore, as far as respects the place of deposit, continues in force. There has been a breach of it, and the lease has been thereby forfeited. Besides, if, as between these parties, this act is to be construed as a private conveyance, the clause re-

laxing

having the lease from a condition, being introduced for his benefit, ought to be construed most strongly against him.

1828.

Dono don.
Brevitas
apud
Basilicam

The *Solicitor General* for the defendant. Although the act of the 46 G. 3. might have been expressed in much clearer terms than it has been, still there is sufficient to lead to the conclusion that it was the intention of the legislature that the leases which had been made under the first act, should not be avoided by breach of the condition contained in that act, but that a new condition should be substituted in the place of the former. It must be conceded, that the lessee having neglected to deposit his coals at *Casson Close* for one year, has committed a breach of the condition contained in the first act, and that if that condition has not been altered by the subsequent acts, the lease has thereby become forfeited. The acts of the 19 G. 3. and 28 G. 3. have altered the condition contained in the first act as far as respects the price allowed to be taken for the coals. They have even altered the condition partially in respect of the place of deposit, for the lessee is authorised to deliver a specified quantity at a place between the mines and the repository at *Casson Close*. It is not disputed that this was a valid and subsisting lease at the time of the passing of the act of the 46 G. 3., and the question is, Whether that act has not relieved the lessee from that part of the condition which required him to deliver his coals at *Casson Close*. It is entitled an act for amending and enlarging the powers of the several former acts, and it revokes those acts, and also, among other things, that if on account of the then inadequate price of the said coals, *C. Brandling* should discontinue

1822.

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 Doe dec.
 Brown
 agent.
 BRANDISH

or give up the wagon-way or depositary, it would materially injure the manufacturers of *hulls* and *hull* cause of great distress to the inhabitants in general. If the construction contended for on the other side were to prevail, it will be in the power of the owners of the lands over which the wagon-way passed, to make it impossible for the owners of the *collieries* to carry *hull* coals to *Leeds*, and the inhabitants of that town will be subjected to the inconveniences which it was the intention of the legislature to prevent. In such a construction of the act would therefore appear to be the manifest and declared intention of the legislature. But then the first enactment of the 33 G. 3. is decisive of the question; it is, "that the said recited acts, and all and every the clauses, &c. &c. therein contained shall have full force and effect, as fully, largely, and amply as if the same were repeated and re-enacted in the body of this present act." The act, therefore, of the 33 G. 3. is to be interpreted as if it had originally conferred on the owner of the lands over which the coals were to be carried, the power of granting leases, which is in one clause it had required that the leases should be subject to a condition that the lessee should deliver the coals at *Catton Close*, and in another clause, that it should be subject to a condition that he should deliver the coals at *Catton Close, or some other place signified to him*, in order to ascertain the meaning of the legislature, it would be necessary to consider together not only the two clauses, the first containing the *best* condition, the other the *enlarged* condition, but the *policy* of the act, and it ought to be construed so as to effect the principal object of the legislature, which was to send *hull* to the inhabitants of *Leeds* a regular supply of coals; and

wide that who could be necessary to give effect to the
 larger condition, and to consider that as virtually incor-
 porated in the lease. In the words of any other place
 near thereto, which are in the enacting clauses of the
 statute, had been in the preamble also, the construction
 of the act would not have admitted of any doubt, but
 those words in the enacting clauses cannot be rejected
 because they do not occur in the preamble, for it is a
 general rule in the construction of acts of parliament,
 and particular words in a preamble shall not restrain or
 extend larger words in the enacting clauses. *Casson*
Case is mentioned in the subsequent clauses of the act
 twenty times, and wherever it occurs, it is always fol-
 lowed by the words "or other place near thereto." The
 sixth section enacts, "that if Mr. B., or other owner
 of the coal shall refuse or neglect to bring, or cease to
 be brought to *Casson Close*, or some other place near
 thereto, to be used as a repository for coals instead
 thereof, the quantity of coals specified, (and after men-
 tioning other acts,) then and in every such case it shall
 be lawful for the proprietors of the lands through which
 the wagon-way is made, to enter." By that clause the
 legislature have substituted a new condition in lieu of the
 old one; and this new condition must be considered as
 incorporated in the lease. The 14 G. 3. contains a clause
 by which the magistrates are authorized to fix the rate
 of carrying coals away from *Casson Close*, but from
 other places near to the said repository. That shews
 clearly that it was the intention of the legislature to make
 a provision perfectly collateral to the interest of the lessor
 and lessee, namely for the interest of third persons.
 The argument on the other side is founded on the sup-
 position that *Casson Close* was named in the first act of

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parliament as a repository for coals for the benefit of the lessors, but in fact it was so named for the benefit of the inhabitants of *Leeds*. It is wholly immaterial to the lessors whether the place of repository were *Cannon Close* or any other place near to it. If the alteration of the place of repository had been prejudicial to the lessors, that would have been stated in the case. It was the manifest intention of the legislature, the state of the circumstances being the same, that there should be a right of way in order that there might be a supply of coals for the inhabitants of *Leeds*, and such a construction ought to be put upon the statute as will effectuate that intention.

Lord TENNYSON G. J. The question in this case depends entirely on the construction of a particular act of parliament. In construing acts of parliament we are to look not only at the language of the preamble, or of any particular clause, but at the language of the whole act. And if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act we can collect, from the more large and extensive expressions used in other parts, the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause. The lease in question is entirely the creature of the acts of parliament. At the time of passing the first act the legislature had before them (as appears by the preamble) first, the inhabitants of *Leeds*, who were anxious to obtain a supply of coals at a moderate price; secondly, Mr.

Brand-

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Brandling, the owner of certain coal mines, who was willing to supply them with a quantity of coals at that price, but who could not afford to supply them at that price unless he could have a particular line of road by which he might carry the coals to the town of *Leeds*; and, thirdly, the owners of certain lands lying between the mines and the town of *Leeds*. The owners of those lands (before they came before the legislature) had made certain agreements to grant to *Mr. Brandling* leases either of those lands over which his coals were to be conveyed, or of a right of way over those lands, for a term of sixty years, and for such further term as the mines might be worked for the supply of the town of *Leeds*. The legislature having all these parties before them, passed an act to carry their agreements into effect. That act, after reciting what was intended, enacts, in the first place, that *Mr. Brandling* may convey his coals over the lands and grounds of the persons who had agreed with him for that purpose. The legislature, therefore, gave him authority to do this (independently of any liberty granted to him by any lease) upon condition that he should convey a fixed quantity every year, and should sell them at a specified price. The clause under which the lease was granted authorizes the owners of the land by indentures under their respective hands and seals, to grant, lease, or demise such of the several lands, wastes, and other grounds so belonging to them respectively, or the liberty and privileges of making, laying, placing, and continuing such waggon-way, in, upon, and over the same respectively, unto him, *Brandling*, his executors, &c., for the said term of sixty years, commencing as aforesaid, and by another clause it is enacted, that the leases shall

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be as valid and effectual, as if the persons making the same were respectively seised in fee simple. There is a proviso, that in case *Brandling* shall refuse or neglect to bring to the repository or coal-yard aforesaid, the quantity of coals required by the act, and shall refuse to sell the same at the specified price, the owners and proprietors of the lands over which the way is made, may re-enter, and that the leasee's interest shall cease, determine, and be void. So that if the leases had contained no clause of re-entry or cesser of the terms, the owners of the lands, (if Mr. *Brandling* had not conveyed the proper quantity of coals, or laid them at the proper place,) would have had a right by authority of the act of parliament, independently of any provision in the lease, to put an end to the leases, and resume their rights. It was afterwards found that the quantity of coals supplied was not equal to that which the inhabitants of *Leeds* required, and that the price allowed by the former act was not an adequate remuneration to Mr. *Brandling*, and it being, therefore, apprehended, that if he (as he might lawfully do,) discontinued to convey his coals to *Leeds*, it would be a great inconvenience to the inhabitants, the act of the 19 G. 3. was passed; that act requires him to convey a larger quantity of coals than he was bound to do by the first act, and authorizes him to receive for them, when brought to *Casson Close*, a higher price. It also enables him to dispose of 1000 dozens of corves of coals (a portion of the entire quantity required to be conveyed,) at a place short of the repository at *Casson Close*; and it contains a new power of re-entry adapted to the alteration made as to the quantity and price, and enacts that the right and interest of *Brandling* in the leases, shall not cease and determine, but that

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he shall continue to have the same interest, although the coals are sold at the higher prices. The 33 G. 3. contains a similar clause, adapted to the alteration of price allowed by that act. Then the preamble to the 45 G. 3. after reciting the several former acts, and that the inhabitants of *Leeds* were willing to pay a higher price for the coals, enacts, "that the said recited acts, and all and every the rates, clauses, powers, agreements, forfeitures, &c. &c., matters and things therein contained, shall be, and the same are hereby declared to be, in full force and effect from and after the passing of this act, during the continuance of the time or term granted by the said recited acts for the purpose of carrying the said recited acts, and this present act, into execution, as fully, largely, and amply as if the same were repeated and re-enacted in the body of this present act." The clause contained in the former acts, by which the lessor is authorized to re-enter, unless the coals were delivered at *Casson Close*, would have remained in full force, if there had been nothing in this act to the contrary; but by the second section it is enacted "that *Brandling* may sell and dispose of the coals which may be deposited at *Casson Close*, or at any other place near thereto, which may be used as a repository for coals instead thereof, to the inhabitants of *Leeds* at the price of 16s. per waggon-load, any thing in the said recited acts, or in any of them, or in any of the leases or agreements granted in pursuance thereof, to the contrary notwithstanding; and that the right and interest of *Brandling*, his heirs, &c., in the said leases or agreements shall not cease and determine, but that he and they shall continue to have the same interest therein, although the said coals are sold at the said sum or price of 16s. a waggon-load

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as aforesaid." This clause appears to have been introduced by the person who drew the act from the mining acts, but he did not attend to the alteration introduced by the act 48 G. 3. The words "as aforesaid" stood ever since, and the new repository was to be in the place of *Casson Close* for the said coals which *Mr. Randall* is allowed to sell at *Mr. Wagoner* and coals deposited at *Casson Close* or some other place as aforesaid to be used as a repository instead thereof. *Casson Close* is mentioned frequently in other parts of the act as a repository, and wherever it is so mentioned it is invariably followed by the words "or any other place as aforesaid to be used as a repository instead thereof." In the clause of re-entry in this bill, the new place of deposit is carefully introduced throughout. It is clear, therefore, that, under the act of parliament, there should be no re-entry on the ground that the coals were deposited at the new place of deposit, substituted for *Casson Close*, and if that be so, can the owner be allowed to re-enter for breach of the covenant contained in the lease? The lease is the creature of the legislature, and under its control. The clause of re-entry contained in it was unnecessary, for the legislature had in the first instance provided for re-entry in the very contract in which it is provided for by the lease, and they have continued to provide for it with the necessary variations from that time. A clause of re-entry was properly introduced into the intermediate act by which the owner of the mines was allowed to mine the price of his coals, and such a clause was necessary in that act, not merely by reason of the alteration of price, but also of the alteration of place at which the coals were to be deposited. Taking the whole of the history of par-

liament

liament together, it seems to me perfectly clear that the legislature did intend by the last act to control, not merely the clause of forfeiture which had occurred in the former acts, but the clause of forfeiture contained in the lease; otherwise this absurdity would follow, that a proviso for re-entry contained in a lease granted in pursuance of an act of parliament, corresponding with the proviso for re-entry contained in that act of parliament, would be efficient after the act of parliament had ceased to be in force. It appears to me impossible to put on this act a construction which will produce such a consequence. I am, therefore, of opinion that this lease has not been forfeited, and that judgment must be entered for the defendant.

I have entertained in this case very considerable doubts during the course of the argument, and those doubts were not removed until a late period. It is incumbent on persons who obtain acts of parliament of this description, to express the object they have in view in plain and distinct terms. The recital in the 48 G. 3. imports that the only inconvenience to be remedied by that act was the inadequate price then allowed to the owner of the collieries for his coals. If it had been the object of the legislature to allow him in future to deposit the coals at any other place than *Casnewydd*, I should have expected that intention to have been disclosed either in the preamble or in some enacting clause, and in terms much more distinct than it is specified in the second section. I should have expected an enactment that the lessee's interest in the lease should continue, not merely, although the coals were sold at the higher price, but although the coals should

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Gibson
Barrister at Law

be deposited at *Casson Close*, not at some place near thereto. I should also have expected some other restriction on the lease, as to the place to be substituted, diminishing contiguity to *Casson Close*. For though the substituted repository may be near to *Casson Close*, the alteration may subject the inhabitants of *Leeds* to great inconvenience. It seems to me, when once this clause had passed, the inhabitants of *Leeds* could have been protected only by the proviso in the lease giving to the landlord the power of continuing *Casson Close* as the repository, not for the sake of his own interest, (for to him it would be quite immaterial) but for the sake of protecting the interests of the inhabitants of *Leeds*. And if the proviso in the lease had been unconnected with the first act of parliament, if it had not been a mere creature of that act, and liable therefore to be varied by subsequent acts, I should have been of opinion that the representatives of the lessor would have had a right to insist that the lessee had no power of his own authority, without the consent of the lessor, to vary the proviso, and therefore that it could not be varied by a clause in a private act of parliament, except by very plain unambiguous language, and that the language used in this act was not sufficient for that purpose. But the whole ground upon which my opinion has been altered to this case is this. This lease has been made in pursuance of the act of parliament, and contains a proviso for re-entry, framed in the very language of the act of parliament. So long as that act continued to be the only act in force, the proviso in the lease could have no operation whatever, for the lessor would have had, under the first act of parliament, exactly the same power of re-entry as he would have by the proviso in the lease.

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The proviso in this lease, which is made under the powers of the act of parliament, is not a distinct and independent proviso, but dependent upon and co-extensive with the proviso in that act of parliament; and liable virtually to be repealed or controlled by any subsequent act of parliament. Now the 1st G. 3. reduces the quantity of coals required to be delivered; it does not leave the proviso contained in the 31 G. 2. in force, as to the quantity which had been required to be delivered by that act; but it contains an entire proviso applicable to the whole quantity to be delivered in future, and then when an additional alteration is made by the 53 G. 3. there is an enactment not framed in the usual language of a proviso, but corresponding in every particular with the terms of the proviso contained in the act of the 31 G. 2. It gives to the lessor a right of re-entry, not merely if the lessee neglects to deliver the additional quantity required by that act, but if he neglects to deliver the entire quantity of coals required to be delivered. Then the 43 G. 3. contains an additional proviso, and the question is, Whether that proviso has not, to all intents and purposes, obliterated the proviso in the 31 G. 2. That proviso is, That it shall be lawful to Mr. Branning, or any owner of the coal works, to sell and dispose of his coals which shall be deposited in the said repository at *Casson Close* aforesaid, or in any other place near or near to it, to be used as a repository for coals instead thereof. I have looked through the different provisions in the act of the 38 G. 3. and it seems to me, that it was in the contemplation of the legislature to have one repository only, so that if *Casson Close* was to be the repository, it was to be considered as such not merely for 20,000 dozens of coals, but for the 50,000 which

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which were required to be deposited under the last act; and if, on the other hand, there was to be a new repository, it was to be a new repository for the whole quantity. Then there is a proviso applicable to the whole quantity. By this proviso the tenant may re-enter only "in case the quantity has not been delivered at *Casson Close*, or at some other place near thereto, to be used as a repository instead thereof." I am therefore inclined to think that there ought to be a judgment of non est. If our opinion is wrong, the plaintiff may bring another action and put the facts upon the record, and submit the case to the decision of a court of law.

HOLROYD J. I am of the same opinion. I think that it was intended by the second section of the 43 G. 3. that if in a particular event there was to be a substitution of another place, instead of *Casson Close*, near thereto, it should be for the whole quantity of coals to be delivered; and that, notwithstanding the proviso for re-entry in the lease, this section does allow a substitution, though by the provisions for re-entry in the former acts of parliament, and in the lease, such a substitution would have been a forfeiture of the lease. This section permits such a substitution, any thing "in the former acts or in the lease to the contrary notwithstanding and charters," that the right and interest of the lessee in the lease shall not determine, but that he shall continue to have the same interest therein, although the coals are sold at the price of 10s. a waggon load as aforesaid." The words "as aforesaid" shew that the latter part of the section applies to coals deposited "at *Casson Close*, or any other place near thereto substituted as a repository, instead of *Casson Close*. It seems

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therefore, to allow to the defendant a higher price for a smaller quantity of coal, because of an additional quantity of coal being required; and likewise a substitution of one place for another, supposing the place substituted was less distant from the place of the act. I therefore think that the defendant is entitled to the judgment of the Court.

I am therefore of opinion that the defendant is entitled to the judgment of the Court. I have not been present during the whole of the argument, but I was present at the former one, and having heard the opinion of my Lord and learned Brothers, I shall only say that I entirely concur with them that the judgment ought to be given for the defendant.

The case was previously argued before three of the Judges of this Court during their sittings in term after Michaelmas term.

The King against Gossard.

THE prisoner was committed to the House of Correction for the county of Middlesex, by the following warrant, signed by a magistrate of Middlesex:

"Whereas Robert Gossard hath been discovered and apprehended under circumstances that denote a dangerous character of mind, and a purpose of committing a crime (that is to say) an attack and breach of the peace, and it is the duty of the Court to commit him to the House of Correction for the county of Middlesex, by the following warrant, signed by a magistrate of Middlesex:

A commitment of an insane person under the 59 & 40 G. 3. c. 94. s. 5. is not a commitment in execution, and is not, therefore, to be construed with the same strictness; and, therefore, a warrant, stating that A. B. had been discovered and apprehended under circumstances that denoted a dangerous character of mind, and a purpose of committing a crime, would be sufficient, although it did not state the name of the person whom the prisoner intended to assault, and it did not appear that the committing magistrate received any evidence to that effect.

for

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The Habeas
Corpus
Act

for which, if committed, he would be liable to be executed; and the said Robert Gowley being brought before me, one of the justices of the peace for the said county, and it appearing to me that I ought to issue a warrant for committing him as a dangerous person suspected to be insane, these are therefore to command you and each of you to receive into your custody the body of the said Robert Gowley, herewith sent, as a dangerous person, suspected to be insane, and his safety to keep in your custody, until he shall be bailed or directed by the statute in that case made and provided, or until he shall be discharged by due course of law; and for so doing this shall be your sufficient warrant. The prisoner being now brought into Court by virtue of a habeas corpus;

Campbell moved that he might be discharged out of custody, because the warrant did not disclose, with sufficient certainty, the cause of commitment. He cited *Dr. Groenock's case (a)*, to shew that the cause of commitment ought to be certain; to the end that the party may know for what he suffers, and how he may regain his liberty; and he contended that this was in the nature of a commitment in execution, for the party might be confined for an indefinite time. A commitment in execution by a magistrate must state that the party has been convicted. Merely stating forth that he was charged on oath with the offence is insufficient. *Harv. Cooper (b)*. So a commitment in execution of a rogue and vagabond under the statute 23 G. 3. c. 39, should state that the defendant was apprehended with the implements of housebreaking

(a) 1 *Ld. Reym.* 615. (b) 6 T. R. 509.

upon him at the time of apprehension. *See T. R. 229 (a)*. This commitment does not shew, that the magistrate heard any evidence on oath, nor does it disclose the name of the party whom the prisoner intended to assault. It merely follows the words of the act of parliament, but that is not sufficient. By the bankrupt acts, the commissioners may commit the bankrupt or other persons examined before them, for not answering lawful questions to their satisfaction. But all the examinations connected with the cause of commitment, must be stated in the warrant of commitment, so as to present on the face of the return, authentically and immediately to the consideration of the Court, the propriety of the detention.

Lord TENTERDEN C. J. The statute, 39 & 40 (G. 3. c. 94. s. 3. under which this commitment took place, enacts as follows: — "And for the better prevention of crimes being committed by persons insane, if any person shall be discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing some crime, for which, if committed, he would be liable to be indicted; and any justice before whom such person may be brought, shall think fit to issue a warrant for committing such person, as a dangerous person, suspected to be insane; such cause of commitment being plainly expressed in the warrant, the person so committed shall not be bailed, except by two justices, one whereof shall be the justice who issued such warrant, or by the quarter sessions, or by one of the judges or lord chancellor, lord keeper or commissioners of the great seal." The commitment authorized by this

1823.

The King
against
Garrett

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*The King
 against
 Governor*

act of parliament is very peculiar. It is not a commitment for safe-custody, in order that the party may afterwards be brought to trial. Nor is it a commitment in execution; but it is a commitment for safe custody, in order to secure the party and prevent mischief to his Majesty's subjects. That being the object, I think the warrant ought not to receive the same strict construction as a warrant in execution. It has been contended, that the warrant ought to have stated the name of the person whom the prisoner shewed a purpose of assaulting. In many cases that might be impossible; as for instance in the case of a man in a high state of excitement, running through a street with a knife or a sword in his hand, intending to murder any person he may meet with; or with a fire-brand in his hand, intending to set fire to any house. If, therefore, we required the same certainty in this as in other cases, we might render the provisions of the act of parliament nugatory. Then it is said, that there was no evidence on oath before the magistrate. But the magistrate states as a positive fact, that the party was discovered and apprehended under circumstances which bring him within the operation of the act of parliament. I think that is sufficient. It is to be observed, too, that this statute requires a greater degree of caution to be used in taking bail than is required in ordinary cases; for it must be taken by two justices (one of them being the committing justice), or the quarter sessions, or a judge. This shews an anxiety on the part of the legislature that a party who has been once detained under this statute should not be permitted improperly to go at large. Upon the whole, I think that the warrant not being a warrant of commitment in execution is sufficiently certain, and that the prisoner must be remanded.

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Ex parte CHARLES BAXTER.

Thursday,
February 7th.

RCHBOLD had obtained a writ of habeas corpus, directed to the keeper of *Newgate*, commanding him to bring up the body of *Charles Baxter*, for the purpose of being discharged out of custody. The warrant of commitment, on being returned, stated that a commission dated the 29th of *November* 1827, had duly issued against *William Baxter*, under which he had been declared a bankrupt; and that *Charles Baxter*, the brother of the bankrupt, was duly summoned to appear, and did appear before the commissioners to be examined. It then set out his examination in form, by which it appeared that he had struck a docket against *William Baxter*, that about a week before the docket was struck against *William Baxter*, he, *Charles Baxter*, had written to *Gissing*, the shopman of his brother, and desired him, *Gissing*, to take his master's stock, which was done. He was then asked, whether his brother had seen him at *Ipswich*, or elsewhere, between the time of his writing the letter to *Gissing*, and the day when he absconded? To which he answered, that he did not recollect, but that he would not swear that he had not seen him in that interval, that he could not possibly say whether he had seen him between those times, but he believed he did see him at *Ipswich*, that he thought he was at *Ipswich* with his own attorney, *Mr. Marston*, who was also, witness's attorney, and who lived at *Norwich*, and that that was after he had written the letter to *Gissing*, and before the bankrupt absconded. The

Where a party, brought before commissioners of bankrupt, and examined by them with a view to ascertain whether the bankruptcy had been concerted between him and the bankrupt, and how the stock of the latter had been disposed of, was asked, with what intention he believed the bankrupt had come to him on a certain day before the docket was struck; to which he answered, that he did not know the bankrupt's intention, and did not know what to say as to his belief: Held, that the question was not material, and that, therefore, although the answer might not be satisfactory, the commissioners had not authority to commit the party.

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 BAXTER.

warrant then set out the following questions and answers: Q. Why did you not state this at first? A. I did not recollect it. — Q. You are requested to consider that last answer, as it is suspected you intended to withhold that fact; did you not recollect from the first that he had been over to you at *Ipswich*? A. I thought you meant by himself. — Q. Now state what passed in that interview between you? A. Mr. *Marston* came over to strike the docket. — The question was repeated. A. Nothing of importance passed between myself and my brother. — Q. State what did pass relative to his circumstances, whether important or not important, in your view of it, state the whole truth? A. I have stated that the attorney came over to strike the docket. — Q. You are requested to state what passed between you and your brother, relative to his circumstances? A. Nothing. — Q. You have before said nothing important; what did pass? A. I now mean to say that nothing at all passed. — Q. For what purpose did your brother then come over to you? I suppose to drive Mr. *Marston*, the attorney, to *Ipswich*, where I lived. — Q. Do you not know that your brother did go from *Norwich* to *Ipswich*, with *Marston*, to you, for the purpose of getting you to strike a docket? A. Mr. *Marston* would have done as well alone. — Q. Have you any other answer to give to that question? A. No. — Q. It is pointed out to you that you have not answered it; have you any other to give? A. No. — Q. You are requested carefully to consider, as it is a question easily to be answered? A. I can give no other answer; my brother might have had business at *Ipswich*, although not with me. — The question was repeated. A. I have no other answer to give. — The question was again repeated. A. If he did,

did, it is unknown to me. — Q. Do you not believe that your brother went with *Marston* from *Norwich* to yourself at *Ipswich* to get you to strike a docket? A. I do not know whether he did or not; I do not know his intention in coming. — Q. You are not asked as to your knowledge, but your belief? A. I would have answered the question long ago. — Q. Answer it now as to your belief? A. I do not know what to say. — Q. Is that the only answer you mean to give? A. Yes. — Q. Having had time for reflection, have you any addition to make to your examination? A. No. — The answers not being satisfactory to the commissioners, they issued the warrant in question. The prisoner being now brought into Court,

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BAXTER.

Sir *James Scarlett* and *Archbold* contended, that he ought to be discharged, because it appeared, by the warrant of commitment, that he was committed to custody for giving an unsatisfactory answer to an immaterial question. By the statute 6 G. 4. c. 16. s. 35. the commissioners are authorised to summon before them any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person whom the commissioners believe capable of giving information concerning any act of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt. Section 34. authorizes the commissioners to examine such person on oath concerning the person, trade, dealings, or estate of such bankrupt, or any act of bankruptcy by such bankrupt committed, and if any person shall refuse to answer any lawful questions put to him by the commissioners,

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Barrat.

touching any of the matters aforesaid, or shall not fully answer, to the satisfaction of the said commissioners, any *such* lawful questions, they may commit him. The commissioners, therefore, are authorized to commit, if there be an unsatisfactory answer to a lawful question. The questions to be lawful, must be touching the person, trade, dealings, or estate of the bankrupt. Here the question was as to the belief which the prisoner entertained as to the intention of his brother. His belief as to such intention could not have any relation to the estate of the bankrupt.

C. Law and E. Knight contra. The question was material, considered with reference to the preceding examination. The statement of the belief of the intent was material, because the grounds of that belief would have formed the next question. That would have led to questions as to the conversation which passed between them, and that was very material; for the state of the bankrupt's affairs, and how, and in what manner he had disposed of his effects, would be the probable topics of conversation between the parties to the concerted commission.

Cir. atto. vult.

The judgment of the Court was now delivered by Lord TENNEN DEN O. J. We have met and considered of this case, which was argued before us yesterday. It is impossible to read the whole of the examination, without seeing that the party brought before the commissioners was most unwilling to make that full and fair disclosure, touching the subject-matter of their inquiry which he was required to do. But although this

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Ex parte
HARRIS.

this is apparent upon all the questions and answers taken together, still we must inquire whether the final question, whereupon the party was committed, was of a nature to warrant that proceeding. The question was respecting the supposed intention of his brother, the bankrupt, in coming to Ipswich. And before we decide as to the sufficiency or insufficiency of the answer, we should see whether this question was material to the duty which the commissioners had to discharge. Their object being to ascertain the real state of the affairs of the bankrupt at that time, whether the bankruptcy had been concerted between the two brothers, and the manner in which his stock had been disposed of, they might have put various other questions to bring them to the same conclusion, and such as the witness might have been more reasonably expected to answer, than a direct question as to intention of a third person in doing a certain act. The answer, in fact, given was that he did not know whether his brother did or did not come with the alleged intention, that he did not know his intention in coming; and then, on his being pressed to answer as to his belief, he answered, he did not know what to say. It is not surprising that the commissioners should think this unsatisfactory, their object being to obtain a full disclosure of all that the witness knew, and not merely to rest upon an examination taken as between party and party. (We cannot, however, say that he refused to answer a material question so as to justify his detention in custody; and the consequence is, that we are bound to discharge him.)

Prisoner discharged.

1828.

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against
The Justices of
the West
Riding of
YORKSHIRE.

and it need not, therefore, state in what manner the parties are aggrieved; and it must be wholly useless to state the fact generally, that they are aggrieved; but here, it appears, upon the face of the notice, that the appellants were inhabitants of *Padsey*. Now, the stopping up of a road leading from *Padsey* to *Gildersome*, must *prima facie* aggrieve the inhabitants of *Padsey*.

Lord TENTERDEN C. J. I certainly cannot distinguish this case from that of *The King v. The Justices of Essex (a)*; but if we came to a wrong decision in that case, we ought now to correct it. We will, therefore, consider the case before we deliver our judgment.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

The objection to the notice of appeal in this case was, that it did not allege that the parties appealing were aggrieved by the order, and in support of that objection *The King v. The Justices of Essex* was relied on. We have considered that decision, and if it had been founded on mistake we should have been ready now to correct it. But, after the best consideration, we think, that if the question had now arisen for the first time, we should have been bound to decide, that the party appealing against an order for stopping up a footway, must, on the face of his notice, shew that he is injured. By the appeal clause in this act of parliament, it is lawful for any person aggrieved by the making of any order for stopping up a road, to appeal against the same, upon giving a notice in writing of such appeal, fourteen days before the sessions. We think the fair meaning of that is, that the

(a) 5 B. & C. 451.

party appealing must give notice that he has sustained an injury by the making of the order. The rule for a mandamus must, therefore, be discharged.

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Rule discharged (a).

(a) The following case, being of a similar nature, is introduced here, although not decided until Trinity term:—

The KING against The Justices of SOMERSETSHIRE.

On the 28th of June 1827, Thomas Palmer gave the following notice of his intention to try, at the July sessions for the county of Somerset, his appeal against the accounts of the churchwardens and overseers of St. Dunstons, in that county; the appeal having been duly entered and respited at the April sessions:—"I do hereby give you and each of you notice, that at the next general quarter sessions of the peace to be holden for the said county, I shall try my appeal against the accounts made up by you or some or one of you as such churchwardens and overseers, or as such overseers as aforesaid, for the year ending the 25th of March last, and by you or one of you sworn to, and allowed by, &c. two justices, on the 4th of April instant; and which said appeal was entered and respited at the last general quarter sessions held for the said county, on the grounds and for the reasons hereinafter set forth, that is to say." The items in the accounts, against which he intended to appeal, were then specified, as well as the several objections which he intended to make to each item; and those objections were, that the charges were unlawful, and ought not to be allowed in the accounts; but it was not stated that he was a party aggrieved, and the justices upon that ground refused to hear the appeal. A rule nisi having been obtained for a mandamus, commanding the justices to cause continuances to the next sessions to be entered, and to hear and determine the merits of the appeal,

A notice of appeal against overseers' accounts, merely stating that the party intended to try his appeal against the accounts, on the grounds and for the reasons therein set forth, and then specifying the items against which he intended to appeal, and the objection which he intended to make to each item, was held to be sufficient, although it was not stated that the party intending to appeal was a rated inhabitant of the parish, or a party aggrieved.

Sir James Scarlett, Cabbell, and Rogers shewed cause. This case must be governed by *The King v. The Justices of Essex* (5 B. & C. 431.), and *Rea v. The Justices of the West Riding of Yorkshire*. The 45 Eliz. c. 2. s. 6. gives the right of appeal "to any person, or persons who shall find themselves grieved with any cess or tax, or other act done by the churchwardens and other persons." That statute, therefore, only gives the right of appeal to a party aggrieved. The 1702 Statute, s. 4. gives the right of appeal against any rate or assessment either to any person who shall find himself aggrieved, or to any person having any material objection to the rate, upon the grounds therein specified; or in the case of overseers' accounts to any person having any material objection to the said accounts, upon giving reasonable notice. In order to entitle a party to appeal under this statute, he must either be a person aggrieved by a rate, or a party having an objection to the rate or accounts. It must have been the intention of the legis-

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lature to give a right of appeal, not to every person who was capable of pointing out objections to the accounts of the overseers, but to those only who had an interest that the parish funds should be properly applied. In *Rees v. Cottingham* (6 T. R. 20.), an inclosure act directed that the public roads to be set out by the commissioners should be repaired in such manner as other public roads are by law to be repaired; and that the private roads should be repaired by such person or persons as they should award. The words, *person or persons*, were held to be confined to those persons who had an interest in the inclosure. So, though the highway act directs that every justice may make presentment, upon information upon oath to him given by any surveyor of the highways; yet the words, *any surveyor*, have been held to be confined to the surveyor of the district, *Rees v. Fylingdale*, (7 B. & C. 488.) Then, if the right of appeal is confined to those persons who have any interest in the proper application of the parish funds, it is necessary for a party intending to appeal to shew, by his attics, that he is a person who has such an interest. He may shew this either by stating that he is a rated inhabitant of the parish, or that he finds himself aggrieved in consequence of such a sum being charged in the accounts. But in this case, he merely states that he intends to appeal, on the ground that particular charges are unlawful, and ought not to be allowed. If that were sufficient, a mere stranger, who had no interest in the funds of the parish, but who was capable of pointing out objections, might appeal. The 41 G. 3. c. 25. s. 4. requires that all notices of appeal against rates or overseers' accounts shall be specified in writing, and it makes no allusion as to the persons entitled to appeal.

Lord TENNYSON C. J. I think the rule for the mandamus ought to be made absolute. It has been contended, that the principle of the decision upon the highway act is applicable to this case, and, therefore, that the notice of appeal was insufficient, because it was not therein alleged that the appellant was a party aggrieved. But the language of the act of presentment, which gives the right of appeal in this case, is very different from the language used in the act which gave the right of appeal in the former case. The statute 55 G. 3. c. 68. s. 3. (which relates to the highway), gave the right of appeal against an order for stopping up a highway to any party aggrieved; and as the stopping up or diverting of a highway might in some degree be considered to aggrieve all his majesty's subjects, we thought that (as the statute had not given the right of appeal to all persons, but to those persons only who had sustained an injury) the legislature intended to confer that privilege upon those persons only who had sustained some special and particular injury; and, therefore, that it was necessary to allege on the face of the notice, that the party intending to appeal was aggrieved; but the language of the 17 G. 2. c. 88. s. 4. which gives the right of appeal against overseers' accounts, is very different. It is in the alternative, and gives a right of appeal to a party aggrieved by a rate, or to a person having any material objection to it on particular grounds,

grounds, or to a person having any material objection to the overseer's accounts. The fourth section of that statute enacts, "that in case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment, made for the relief of the poor," so far the statute gives the appeal to "the party aggrieved;" but then those words are dropped, and it goes on: "Or shall have any material objection to any person or persons being put on or left out of such rate or assessment, onto the sum charged on any persons therein; or shall have any material objection to such account as aforesaid, &c. it shall be lawful for such person in any of the cases aforesaid to appeal." This statute, therefore, gives the right of appeal in the case of overseers' accounts, to any person having a material objection to those accounts. The statute 41 G. 3. c. 23. makes no alteration in the law as to the persons intitled to appeal, but merely requires that all notices shall be in writing, and shall specify the grounds of objection. Now, in this case the person giving the notice of appeal, says in his notice, I have material objections to your accounts; and he then proceeds to specify those objections, according to the provisions of the 41 G. 3. He has, therefore, brought himself within the description of persons entitled to appeal by the 17 G. 2. c. 28. s. 4. If it should turn out that he is a mere stranger, the court of quarter sessions may refuse to hear him. The rule for a mandamus must, therefore, be made absolute.

Rule absolute.

Taunton, Jeremy, and Rogers, were to have argued in support of the rule.

MOUNSEY *against* WATSON.

Thursday,
February 7th.

THE plaintiff in this case was an attorney, but sued by *latitat* and not by attachment of privilege. The venue being laid in *Middlesex* the defendant changed it to *Cumberland*, on the common affidavit that the cause of action arose there. A rule nisi was obtained to bring back the venue, on the ground that the plaintiff, being an attorney, had a right to retain it in *Middlesex*.

An attorney suing by *latitat*, and not by attachment of privilege, loses his right to retain the venue in *Middlesex*.

Alderson shewed cause, and contended, that unless the plaintiff sued as an attorney he could not insist upon that privilege; *Hetherington v. Lowth (a)*.

(a) 2 Str. 637.

The

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the West
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The *Solicitor-General*, contra, contended, that the plaintiff did not waive his privilege to lay the venue in *Middlesex*, by waiving that of suing by attachment, of privilege.

Per Curiam. Where an attorney sues as a common person, and not as an officer of the court, the proceedings must be governed by the ordinary rules of practice. The rule for bringing back the venue must, therefore, be discharged.

Rule discharged.

Thursday,
February 7th.

TILL and Another, Assignees of BRETT, a
Bankrupt, against WILSON.

A second commission, issued against a trader before a former commission has been disposed of, is a nullity; and where a bankrupt obtained his certificate under a second commission issued under such circumstances: Held, that he was not entitled to be discharged out of custody, although the debt for which he was detained was contracted before the issuing of that commission.

THIS was an action of assumpsit for goods sold and delivered by *Brett* before his bankruptcy. The defendant obtained a rule to shew cause why he should not be discharged out of custody in this action, on the ground that he had obtained his certificate under a commission of bankruptcy issued against him after the debt for which the action was brought had been incurred. It appeared by the affidavits, that in 1816, *Wilson* became bankrupt, a commission was issued, and assignees chosen, but the defendant never obtained a certificate under it. In 1818 he commenced trade again, and in 1823 contracted the debt in question; and, in 1827, a second commission was awarded and issued against *Wilson*, under which he obtained his

in Parker v. White & Black, 1827 certificate.
Hobbs v. Chas. 7 Aug 1818
Phillips v. Stephens 1822

The *Solicitor General* and *Chitty* shewed cause. The second commission having issued against the bankrupt before

before he got his certificate under the first (that having been in legal operation), is wholly void. The statute 6 G. 4. c. 16. leaves the law as to this question unaltered. Section 2. enacts, "that all persons, who either for themselves, or as agents or factors for others, seek their livelihood by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed *traders*, and liable to become bankrupts."

Now, before that statute, it had been held that, as all the property of the bankrupt vested by the assignment in the assignees under the first commission, he was incapable of trading, and that the subsequently acquired property being affected by the assignment, and vesting in his assignees, there was nothing to pass under a second commission, and, therefore, it was inoperative. *Ex parte Proudfoot (a)*, *Martin v. O'Hara (b)*, *Ex parte Bold (c)*, *Ex parte Crew (d)*, *Ex parte Bullen (e)*, *Ex parte Martin (f)*, *Ex parte Thompson (g)*, *Ex parte Brown (h)*. The case of *Troughton v. Gitley (i)*, may be relied on in support of the rule, but in that case there was no second commission. There the bankrupt bought his own stock in trade of his assignees, and sureties joined in a security to them for the consideration, and the bankrupt continued to trade for four years afterwards, and then died without having obtained his certificate, having contracted fresh debts subsequently to his bankruptcy. Lord Camden held that the subsequent creditors had an equity on the subsequently acquired goods in the hands of the adminis-

1828.

 TILL
against
WILSON.
(a) 1 *Atk.* 251.(c) *C. B. L.* 12.(e) 1 *Rose*, 134.(g) 1 *Rose*, 285.(i) *Amb.* 630.(b) *Comp.* 823.(d) 16 *Ves.* 236.(f) 15 *Ves.* 114.(h) 1 *Ves. & B.* 60.

1828.

THE
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trator of the bankrupt, and directed the residue to be paid over to the assignees. But the authority of that case was called in question by Lord Eldon in *Ex parte Martin* (a). In *Warner v. Barber* (b), there were two commissions, but the first was never acted upon or superseded; and it was held, that such commission, not being in legal operation, did not invalidate a second commission. But no property passes under a commission without an assignment. The commission is a mere authority. It is true that formerly it was the practice to sue out joint commissions against two persons, and afterwards a separate commission against each. But since in *Ex parte Baudier* (c), Lord Hardwicke allowed two distinct accounts to be kept, one of the joint and the other of the separate estate, the practice has been discontinued. If the assignees, indeed, allow the bankrupt to trade, he may sue on contracts made personally with himself. But that is because the party who has contracted with and is sued by the bankrupt, is estopped from saying that he was incapable of contracting, *Clark v. Calvert* (d); the assignees may at any time claim the property of the bankrupt, for all the property embarked in his trade, as well as the profits of that trade, belongs to them. If the second commission were not void, the effect of section 127. of the 6 G. 4. c. 16. might be, that a bankrupt would be better off where he did not obtain his certificate, than where he did. For that section enacts, "that if any person who shall have been so discharged by such certificate as aforesaid, &c. shall become bankrupt, and have obtained, or shall hereafter obtain such certificate, unless his estate shall produce

(a) 15 Ves. 116.

(c) 1 All. 98.

(b) 8 Tamm. 176.

(d) 5 Moore, 96.

sufficient to pay 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects shall vest in his assignees." This clause does not apply to a case where a bankrupt has not obtained his certificate under the first commission; consequently a bankrupt who has not obtained such certificate under the first commission, but who obtains it under the second, though he does not pay 15s. in the pound, may acquire subsequent property. But in the case of a bankrupt who has obtained his certificate under both commissions, and who does not pay 15s. in the pound under the second, all his future effects will vest in his assignees.

1828.

 TIL
 against
 Wilson.

Parke contra. There are, undoubtedly, several dicta in the reports of cases in the courts of equity, that a second commission taken out against a party who has not obtained his certificate under the first is void. But it will be found that most of them are founded upon the authority of Lord *Hardwicke*, who, in the case of *Ex parte Proudfoot (a)*, said that a second commission was void at law. The ground was, that the bankrupt's property was vested in his first assignees, and there was nothing for the second commission to operate upon; but when that case was decided, it was considered that an uncertificated bankrupt could in no case acquire any property. It has since, however, been fully settled that he has a special property in goods acquired by himself after bankruptcy, and that he may maintain trover for them against strangers, *Webb v. Fox (b)*. The opinion of Lord *Hardwicke* may therefore have proceeded upon a wrong impression as to the law in this re-

(a) 1 *Atk.* 255.(b) 7 *T. R.* 391.

1828.

TILL
against
WILSON.

spect. At all events, an uncertificated bankrupt has some interest which would pass to his assignees under a second commission; for he has an equitable interest in the surplus of his effects administered under the first commission, which remains after payment of his debts. A second commission may, therefore, issue, and be supported at law, at least, until it is avoided by a supersedeas. In *Butts v. Bilke* (a), it was considered by Lord Chief Baron Thomson as a question of great difficulty, whether a second commission was void, or merely voidable; but the point was not decided. Admitting, however, that a second commission is absolutely void at law, on the ground that an uncertificated bankrupt cannot acquire property, or cannot be a trader, it is void only in the same way, and to the same extent, that a commission against a person not being a trader, could be; but under such a commission, a bankrupt who has obtained his certificate, is entitled to the benefit of it; and in any action which is brought against him, the certificate is conclusive evidence of all the requisites to support the commission. If his certificate is pleaded, no inquiry can be entered into, at *Nisi Prius*, or in any other way in a court of law, whether the bankrupt was a trader, or whether an act of bankruptcy was committed, *Bateson v. Haristree* (b). This case was decided upon the 5 G. 2. c. 30. s. 7. But the 6 G. 4. c. 163. s. 20. has a similar clause which makes the certificate conclusive evidence. The invalidity, therefore, of the commission under which the certificate is obtained, cannot deprive a bankrupt of the benefit of such a certificate. If the commission itself is superseded, the certificate falls of course. The case of *Martin v. Gifford* (c) 1827

(a) 4 Price, 208.

(b) 4 Esp. 42.

(c) Comp. 225.

be supported on the ground of the commission being fraudulent. At all events, the argument founded upon the 5 G. 2. c. 30. that the certificate was conclusive evidence, does not appear to have been offered to the attention of the Court. (*Bayley J.* In *Es parte Flood-Roberts (a)* a third commission was held valid, although the bankrupt had not paid 10s. in the pound under the second.)

See also *Wells v. Wells*, 10 G. 2. 1000. *Osborne v. Wells*.

The judgment of the Court was now delivered by

Lord TREWVARTHEN C. J. This was an application on behalf of the defendant to be discharged out of custody on the ground that he had obtained his certificate under a commission of bankrupt awarded and issued against him, and that the debt for which he is in custody might have been proved under that commission. The answer given was, that the certificate was obtained under a second commission against the defendant, a former one having been awarded and never disposed of; and the case of *Martin v. O'Hara (b)* was cited in support of the objection, where the Court refused to enter an exoneretur on a bail-piece, on account of the defendant's having obtained his certificate under a second commission, it having been refused under the first. It is true that in that case the second commission was a mere trick and contrivance to cheat the creditors, and that the plaintiff was a creditor before the issuing of the first commission. Here there is not any evidence of that nature, but, on the other hand, there is not any evidence that the assignment under the first commission or the creditors ever assented to the subsequent trading. In addition to the case of *Martin v. O'Hara*, several cases were quoted in

1823.

THE
CASES
AGAINST
WELLS.

(a) 2 Ross, 172.

(b) Crisp. 223.

1828.

The
case
against
Watson.

which Lord Chancellor *Eldon* expressed an opinion that a second commission issued under such circumstances is altogether void. On the other hand, the case of *Webb v. Fox* (a) was cited, but that merely decided that an uncertificated bankrupt might maintain trover against a stranger for goods acquired after his bankruptcy, because he had a right to them as against all persons except his assignees. Reference was also made to the case of *Butts v. Bilke* (b), in which the Court of Exchequer expressed a doubt as to the absolute nullity of the second commission. They seem to have thought that the Lord Chancellor might supersede the first commission, and that then the second would be in force. We are not called upon to decide what would be the effect of superseding the first commission, it is sufficient for the present case to say that upon the authorities and opinions referred to we are of opinion that the second commission is a nullity, inasmuch as there is nothing upon which it can operate, all the bankrupt's property being vested in the assignees under the first commission. The case mentioned by my Brother *Bayley* does not militate against this. There three commissions had issued against the bankrupt; he had obtained his certificate under the first and second, but had not under the latter paid a dividend of 15s. in the pound; and on that ground a petition was presented for superseding the third commission. But the Lord Chancellor refused to do so, inasmuch as the statute then in force, which made the future effects liable where a bankrupt had not paid 15s. in the pound under a second commission, did not vest those effects in the assignees. That has since been altered by the 6 G. 4. c. 16. s. 127; and, for the

(a) 7 T. R. 391.

(b) 4 Price 240.

reason assigned, the case is no authority on the present occasion. On these grounds we feel bound to refuse to the party making this application the benefit of his certificate under the second commission.

1828.

THE
King
against
WILSON.

Rule discharged (a).

(a) See *Duncan's Law of Bankruptcy*, vol. 1, p. 127.

THE KING *against* THE JUSTICES OF LANCASHIRE.

Thursday,
February 7th.

A RULE had been obtained for a mandamus to the justices to enter continuances, and hear an appeal which had been dismissed for want of sufficient notice. It appeared by the affidavit of *James M'Queen*, attorney, that on the 6th of July 1827 he was instructed by one of the overseers of *Blagg*, in the county of *Derby*, to appeal against an order of removal dated the 28th of June, and he was informed by the overseer that he had received a copy of that order on the 4th. At the next quarter sessions held on the 16th of July, from the distance of witnesses, and difficulty of access, he had not had sufficient time to make enquiries, and collect evidence for those sessions, and the appeal was, therefore, lodged and respited to the October sessions, which were held on the 22d of October. On the 8th of October he served notices of appeal on the parish-officers of the removing parish. By a rule of the court of quarter sessions, made in January 1816, it was resolved that, for the future, in all cases of appeals to be tried (unless otherwise directed by act of parliament) the appellants should give to the respondents fourteen days' notice in writing of such appeals, *exclusive of the day of notice, and the day of*

Where an appeal against an order of removal was dismissed on the ground that the appellant had not given the notice required by the rules of the justices, this Court, thinking it reasonable that the appeal should be heard, granted a mandamus to the justices to enter continuances and hear the appeal.

1828.
The King
against
The Justices of
Lancashire

holding the sessions at which the same were to be tried. The attorney thought the fourteen days were to be calculated one day exclusive, the other inclusive. The Court of quarter sessions dismissed the appeal on the ground that the notice was one day too late.

Armstrong shewed cause, and contended that the justices had power to make rules for the government of the proceedings in their court; that the rule in question was perfectly clear and free from ambiguity, and, therefore, they were well warranted in dismissing the appeal of a party who had not complied with that rule.

Coltman, contra, relied on the case of *Rees vs The Justices of Wiltshire* (a), where this Court ordered the justices to hear an appeal which had been dismissed for non-compliance with the rule laid down by them as to giving notice.

Lord TENYERDEN C. J. We think that justice will be most satisfactorily administered by ordering the justices to enter continuances and hear this appeal. They certainly have a discretionary power to make rules for the government of the practice at the sessions, but the case cited shews that this Court, for the purposes of justice, will interfere to controul that discretion.

Rule absolute.

(a) 10 East, 404.

1826.

**FURNELL against S. SMITH and W. SMITH, Bail
of J. STROUDFIELD in a Cause of FURNELL vs
STROUDFIELD.**

Thursday,
February 7th.

Notwithstanding the ca. sa. against the original defendant was lodged in the office of the sheriff of *Middlesex*, on *Friday* the 18th of *January*, returnable on *Wednesday*, after eight days of *Saint Hilary*. The ca. sa. remained in the office until *Thursday* the 24th day of *January*, the day after the return-day; it was then fetched away, and on the same day a scint facias was lodged in the office of the sheriff of *Middlesex*, returnable on *Tuesday* next after fourteen days of *Saint Hilary*. A *Sunday* intervened between the lodging of the ca. sa. and the return. A rule nisi had been obtained by *Archbold* for setting aside the proceedings against the bail for irregularity, on the ground that the ca. sa. had not remained in the sheriff's office four entire days before the return day, exclusive of the day when it was lodged, and of the return day and the intervening *Sunday*, and he cited *Howard v. Smith (a)*, to shew that the *Sunday* was not to be reckoned as one of the four days.

In order to charge the bail a ca. sa. against the original defendant must be in the sheriff's office four days before the return day, exclusive of the day when it is lodged and of the return day, and an intervening *Sunday* is not to be reckoned one of the four days.

Chitty now shewed cause. In *Howard v. Smith* it was assumed that the four days were to be reckoned, exclusive of the day of lodging the ca. sa. and the return day. But the general rule is, that where the law requires an act to be done within a specified number of

(a) 1 B. & A. 528.

1828.

FURNELL
against
SMITH.

days, one day is to be reckoned *exclusive*, the other *inclusive*.

The Court having directed the Master to ascertain what the practice was, he certified the practice to be, that to charge the bail the *ca. sa.* must remain in the office four entire days before the return day, *exclusive* of the day when it is lodged, and of the return day.

Lord TENTERDEN C. J. That being the practice, this rule must be made absolute; for the case of *Howard v. Smith* shews, that the intervening *Sunday* is not to be reckoned as one of those days.

Rule absolute.

1828.

The King against Sir G. CHETWYND, Bart.*Friday,
February 8th.*

INFORMATION, in the nature of a quo warranto, against the defendant, for usurping the office of a burgess of the borough of *Stafford*. Plea, that the said borough then was, and from time immemorial had been an ancient borough, and that the burgesses of the borough had been and still were a body corporate, in deed, fact, and name, as well by prescription as by divers charters, by various names of incorporation, &c.; and that within the borough, during all the time aforesaid, there had been and still was an indefinite number of burgesses, and also a common council, consisting at different times of different persons and descriptions of persons, and that the common council for the time being, or the major part of them, whereof the mayor of the borough, when there had been a mayor, had been one, or the two bailiffs of the borough, when there had been such bailiffs, and no mayor thereof, had been two, *being duly*

Information for usurping the office of burgess of the borough of *S.* Plea, that the burgesses were a body corporate by prescription as well as by charter, and that the common council, or the major part of them, being duly assembled as such common council for such purpose within the borough, from time to time, and as often as it had seemed fit and convenient to them, had elected so many persons to be burgesses as to them seemed fit.

The plea then (after setting out a charter, by which the king granted that there should be a mayor, ten aldermen, and ten capital burgesses, and that they should be the common council for all things touching the government of the borough), stated, that from thenceforth there had been, and still were within the borough, a mayor, ten aldermen, and ten capital burgesses, and an indefinite number of burgesses, and a common council; that on, &c., the then mayor, and divers, to wit, nine of the aldermen of the borough, being the major part of the aldermen, and nine of the capital burgesses, being the major part of such ten capital burgesses, so granted by the charter, being the major part of the common council of the borough for the time being, duly assembled and met together as such common council, for the purpose of electing a burgess, and being so assembled, it seemed fit to them to elect, and they did elect, the defendant to be a burgess. Replication, that notice of the purpose for which the supposed assembly of the common council was to be held was not at any time before the said assembly was held given to the aldermen or capital burgesses of the borough, or any or either of them: Held, upon demurrer, that the replication was bad, because it assumed, as a general proposition of law, that there could not be any lawful assembly for the purpose of electing a burgess without previous notice of the purpose of the meeting having been given to every member of each select body of the common council; whereas, if all the members of such select body were present at, and concurred in the election, such notice would have been unnecessary.

1820.

The King
against
Carver.

assented and met together at such common council for such purpose within the borough, from time to time, when and as often as it had seemed fit and convenient to them, had elected, sworn, and admitted such and so many person and persons to be burgesses or burgesses, and into the office of a burgess or burgesses of the Borough, as at them from time to time had seemed fit and convenient. The plea then set out a charter of King James the First, by which, after setting that the Borough was an ancient Borough, and that the burgesses of the same Borough from time immemorial had used and enjoyed divers privileges, as well by charter as by reason of divers prescriptions, the king granted, that there should be a mayor, ten aldermen, and ten capital burgesses, and that the mayor, aldermen, and capital burgesses should be called the common council of the Borough, for all things touching the Borough, as the rule and government thereof. It then stated that the charter was accepted, and that from the time of the granting and accepting the charter, the corporation thereby constituted had been and still were a body corporate, by the name of "The Mayor and Burgesses of the Borough of Stafford, in the County of Stafford," and that from thenceforth there had been and still were, within the Borough, one mayor, and divers, to wit, ten aldermen and ten capital burgesses, and an indefinite number of burgesses of the Borough, and such common council thereof as last aforesaid. The plea then stated, that on the 6th of March 1820, the then mayor, and divers, to wit (a), nine of the aldermen

(a) The allegation, as it originally stood, was as follows: and our Lord said, The then mayor, and divers, to wit, ten of the aldermen and ten of the capital burgesses of the said Borough, being then and there the major part

1828.

The King against Sir G. CHETWYND, Bart.*Friday,
February 8th.*

INFORMATION, in the nature of a quo warranto, against the defendant, for usurping the office of a burgess of the borough of *Stafford*. Plea, that the said borough then was, and from time immemorial had been an ancient borough, and that the burgesses of the borough had been and still were a body corporate, in deed, fact, and name, as well by prescription as by divers charters, by various names of incorporation, &c.; and that within the borough, during all the time aforesaid, there had been and still was an indefinite number of burgesses, and also a common council, consisting at different times of different persons and descriptions of persons, and that the common council for the time being, or the major part of them, whereof the mayor of the borough, when there had been a mayor, had been one, or the two bailiffs of the borough, when there had been such bailiffs, and no mayor thereof, had been two, *being duly*

Information for usurping the office of burgess of the borough of *S.*

Plea, that the burgesses were a body corporate by prescription as well as by charter, and that the common council, or the major part of them, being duly assembled as such common council for such purpose within the borough, from time to time, and as often as it had seemed fit and convenient to them, had elected so many persons to be burgesses as to them seemed fit.

The plea then (after setting out a charter, by which the king granted that there should be a mayor, ten aldermen, and ten capital burgesses, and that they should be the common council for all things touching the government of the borough), stated, that from thenceforth there had been, and still were within the borough, a mayor, ten aldermen, and ten capital burgesses, and an indefinite number of burgesses, and a common council; that on, &c., the then mayor, and divers, to wit, nine of the aldermen of the borough, being the major part of the aldermen, and nine of the capital burgesses, being the major part of such ten capital burgesses, so granted by the charter, being the major part of the common council of the borough for the time being, duly assembled and met together as such common council, for the purpose of electing a burgess, and being so assembled, it seemed fit to them to elect, and they did elect, the defendant to be a burgess. Replication, that notice of the purpose for which the supposed assembly of the common council was to be held was not at any time before the said assembly was held given to the aldermen or capital burgesses of the borough, or any or either of them: Held, upon demurrer, that the replication was bad, because it assumed, as a general proposition of law, that there could not be any lawful assembly for the purpose of electing a burgess without previous notice of the purpose of the meeting having been given to every member of each select body of the common council; whereas, if all the members of such select body were present at, and concurred in the election, such notice would have been unnecessary.

1828.

The King
against
Cheswylde.

borough, and from thence until the exhibiting of the information was and still is a burgess of the borough. Replication (a) to the plea, that notice of the purpose for which the supposed assembly or meeting of the common council was to be held, was not, at any time before the said assembly or meeting was held, given to the aldermen and capital burgesses of the borough, or any or either of them, and that the said assembly or meeting was held without any notice having been given that the same was to be held for the purpose of electing a burgess or burgesses. Rejoinder to this replication, that the said assembly or meeting was held at the instance of the then mayor of the borough for the purpose of electing a burgess, heretofore, to wit, on the 6th March 1820, at the then office of the then mayor of and in the said borough, at 11 o'clock in the morning; and that before the holding of the said assembly, &c. notice thereof was given to the then aldermen and capital burgesses of and within the borough, in manner following; that is to say, by the then mayor of the borough on the day next before the same was so held, to wit, on the 5th March 1820, at the borough aforesaid, causing to be delivered to or left at the place of abode of each of the then aldermen and capital burgesses of and within the borough, a certain paper, whereby he was requested to take his seat at the same

(a) There were several other replications; one of them stated that the mayor, aldermen, and capital burgesses alleged to have been assembled on the 5th of March 1820, were not duly assembled for the purpose of electing, swearing, and admitting a burgess, and concluded to the contrary; and upon that issue was joined. Another stated that the mayor, aldermen, &c. did not duly elect the defendant to be a burgess, and upon that also issue was joined.

mayor's

mayor's office on the morning then next, at eleven of the clock, and by causing a certain large bell of a certain church within the borough, called *St. Mary's church*, to be twice tolled, divers, to wit, twenty-one times, on the morning of or before the holding of the same assembly or meeting, leaving a reasonable pause between each of the two times of the same being so tolled, being then and there the usual and customary manner of giving notice to the aldermen and capital burgesses of the holding of a common council for the purpose of electing burgesses; and being then and there well known to them to be such customary manner of giving notice. Surjoinder, that the manner of giving notice of the holding of the common council in that rejoinder mentioned hath been and is the usual and customary, and universal and only manner of giving notice to the aldermen and capital burgesses of and within the said borough of the holding of a common council, *for whatever purpose the same hath been or is summoned or held, or whatever business hath been to be, or hath been transacted or done thereat; and that for fifty years last past such notice of the holding of the common council hath been given to the aldermen and capital burgesses for whatever purpose the said common council hath been summoned or held, and whatever business hath been to be or hath been transacted or done thereat; and that there hath not been and is not any usual or customary manner of giving notice of the holding of a common council for the election of burgesses different or distinct from the said manner of giving notice of the holding of the same, for whatever purpose the same hath been summoned or held, or whatever business hath been to be or hath been*

trans-

1828.

The King
against
Commonwealth

1881

The King
against
Cousins

transacted or done therein. Defendant and jointer in demurrer. The case was argued in Michaelmas term 1880, by *Mr. J. B. Gurnea* for the plaintiff and *Mr. J. B. Gurnea* for the defendant. *Mr. J. B. Gurnea* in support of the demurrer. The plea states a prescription or grant for the common council, duly assembled for such purpose, to elect burgesses, and then alleges, that the common council being duly assembled, did elect the defendant. The replication does not deny the fact, that the common council was duly assembled for the purpose of electing burgesses, but merely alleges that no notice of the purpose for which the common council was to be held, was given to the aldermen or capital burgesses. Neither the prescription nor charter stated in the plea requires any such notice. The replication, therefore, assumes that by law previous notice of the purpose for which a corporate meeting is to be held, is in all cases necessary. If any case can be put in which the common council could for the purpose of electing burgesses, be duly assembled without notice, the replication is bad. Now, if every member of the common council were present at the time of the election, and consented to it, notice of the purpose of meeting would be unnecessary. *See v. Theodorick (a), Rex v. Strongways (b), and Rex v. White (c).* In *Rex v. Hughes (d)*, it was information in the nature of a quo warranto for usurping the office of mayor of *Montbourn*, the plea was that the defendant was duly elected, according to the governing charter of the borough. Replication, that there were two candidates;

(a) 8 East, 543.

(b) Cited in *Rex v. Mayor of Shrewsbury*, 5 B. & C. 111.

(c) 1 Barnardiston, 80.

(d) 4 B. & C. 568.

didates;

didates; that fifty good votes tendered for the losing
 candidate, were improperly rejected; and that thirty-
 eight persons who had been unduly elected, and ad-
 mitted as burgesses, were received as voters for the
 defendant; and that a majority of the legal votes ten-
 dered, was in favour of the other candidate. On de-
 nurrer, it was held that the replication was bad, for
 that, it was only an argumentative, and not a direct
 denial of the validity of the defendant's election. Here
 the replication is argumentative, for it does not deny
 that the common council was duly assembled, but merely
 alleges that no notice of the purpose of the meeting was
 given; and from that a conclusion is to be drawn, that
 the common council was not duly assembled. All the
 facts stated in the plea might be given in evidence
 upon the issue, that the common council was not
 duly convened. The surrejoinder is bad, because the
 rejoinder states that a previous notice was given, and
 describes it, and then avers that it was the usual mode
 of giving notice of holding a common council for the
 purpose of electing burgesses; and that it was well
 known to be so. The surrejoinder does not deny that
 that was the usual manner of giving notice for that
 purpose, but alleges that it was the usual and only
 manner of giving notice of the holding of a common
 council for any purpose; and then alleges, that there
 was not any usual manner of giving notice of the
 holding of a common council for electing burgesses,
 different from the manner of giving notice of the holding
 of a common council for any other purpose. But the
 question is, What was the manner of giving notice, at
 the time when it was given, and the common council
 held

1828:

 The King
 against
 Countess

1828

The King
against
Campbell.

held for electing the defendant, and Whether the notice given was the usual notice for holding a common council for the purpose of electing burgesses? and not, Whether notices like it were given for the holding of a common council for other purposes?

And shew to

Campbell contra. The replication is good for the prosecutor is at liberty to deny in the replication any fact upon which the validity of the election stated in the plea, depends. Now, where a select body are to meet and do some particular act, notice must be given to each member, and if the meeting be not on a charter-day, notice of the particular business to be transacted must also be given, *Res v. The Mayor of Carlisle* (a), *Res v. The Mayor of Liverpool* (b), *Res v. The Mayor of Doncaster* (c), *Musgrove v. Nevinsom* (d). And *Res v. Hill* (e) is a decisive authority to shew that notice of the purpose for which this corporate meeting was held, ought to have been given. If notice be prima facie necessary, it lay on the defendant to shew those facts which rendered it unnecessary. Now the defendant merely shews by his plea, that divers aldermen and burgesses, being the major part of the common council, were present at the meeting. He does not even shew that they all concurred in the election. Assuming the replication to be good, the rejoinder is bad, for it neither traverses any fact, nor does it confess and avoid the matter stated in the replication. The surrejoinder is sufficient, because it shews that proper notice of the

(a) 1 Str. 585.

(c) 2 Burr. 738.

(e) 4 B. & C. 426.

(b) 2 Burr. 723.

(d) 2 Ld. Raym. 1358.

meeting

meeting at which the defendant was elected, was not given.

1833,

The King
against
Carrington

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

This was an information in the nature of quo warranto to try by what right the defendant exercised the office of burgess in the borough of Stafford. It is sufficient for the present purpose to state that the plea set forth an election of the defendant by the mayor and common council of that borough duly assembled. The plea, as it now stands, appears to be good. The replication stated, in substance, that no notice was given of this assembly, or of the purpose for which it was about to assemble. There is then a rejoinder, and afterwards, a sur-rejoinder, and to that there is a demurrer. Now the proper way of raising the question intended to have been raised by the replication, would have been, to have denied that the assembly was duly assembled, and that form of replication would have been adopted some years ago; all the facts necessary to a due consideration and decision of that question might then have been received in evidence upon the issue joined on such a replication, and might, if necessary, have been put upon the record in the shape of a special verdict. The object of the replication is to bring the question of law immediately before the Court, without resorting to the expenses of a trial, and that is a proper object, if it can be legitimately obtained; when it cannot, the practice leads only to perplexity. Now the replication that no notice of the purpose for which this meeting was to be

1855.

The King
against
Cannerton

be held was given, assume the proposition of law that there cannot be a due assembly of a select body of a corporation (in this it fits the purpose of an election, unless previous notice has been given of the purpose of the intended meeting. If that proposition is not universal, the replication is bad. If there may be, under any circumstances, a good elective assembly of such a body, without notice of the purpose, the replication is not done enough; and we are all of opinion that it is not a general proposition of law that there may not be a good elective assembly of a select body of a corporation, without notice of the purpose of that meeting having been previously given. The case relied upon in support of the proposition that there cannot be a good elective assembly without previous notice of the purpose for which it is held, was *The King v. Hill* (a). The difference in the pleadings in that case and the present is, that there the defendant claiming under the election, pleaded specially the form and manner in which the meetings were held, and upon his plea it appeared that they were not well held. Here the plea is good, because it alleges that the elective assembly, at which the election took place, was duly held. That is the distinction between the two cases. It appears to me impossible to say that there may not be, under some circumstances, a valid elective assembly by a select part of the corporation, without previous notice being given of the object of such assembly. Suppose all the members of each select body to have been present at the time of election, and to have agreed that they would proceed to an election, and that they did proceed, we could not say it would not be a good election.

(a) 4 B. & C. 428.

Suppose

Supposed to be; misinterpreted, and misinterpreted usage, upon deliberating, as forty members of the common council, acquiesced in the election, although the special purpose of the meeting did not show positively intentioned, it is possible that a different, but not any that a different attitude should not be good; and if there is a different attitude in things may be a good election with no matter of the council; of the meeting having been a different opinion; of this implication; it is not a good thing. And so all are in the same position before the election would be valid; and, at the same time, the judgment in this case would be the same. *For the purpose of the election, it is not a good thing.*

verdict for the defendant.

which was destroyed by fire on 11/11/1967.

ed ni sonre

subscribed and sworn to before me this 1st day of March 1880.

υπαρχουσα ΗΛΕΥΘΕΡΙΑ εναντιον Τυραννου.

1899c

The Line against Cannibals

Taylor. v. Shuttleworth & Bing. 24C 277

**Friday,
February 8th.**

has had 91
BY an order of Nisi Prius made in this cause on the
26th May 1825, a verdict was entered for the
plaintiff for 500*l.* damages, subject to the award of an
arbitrator to whom the cause and all matters in dif-
ference between the parties were referred, and he was
to order whatever he should think fit to be done by
either of them; and the costs of the cause were to abide
the event, and the costs of the reference were to be in
the discretion of the arbitrator. On the 7th of January
1826, a commission of bankruptcy issued against Has-
well, the plaintiff, under which he was duly declared a
bankrupt. On the 24th January 1826, the arbitrator

Where a cause, and all matters, of difference, were referred at Nisi Prius to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter; and between the time of making the order of reference and taxing costs, and signing indorsement, the

plaintiff's bankruptcy: Held, that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged as to that debt by his certificate.

Vol. VII.

Z z

made See Brough. n. Adcock
7 Bury. p. 650

1826.

—
 Plaintiff
 against
 Defendant.

made his award, and ordered the plaintiff to pay to the defendant 34*l.* 1*s.* 9*d.* on account of a matter in difference between the parties, and he further ordered the plaintiff to pay the costs of the award, and of the defendant in the reference. The plaintiff obtained his certificate on the 27th November 1826, which was afterwards duly allowed. On the 21st of April 1828, the costs of the cause and of the reference were taxed at 103*l.* 10*s.* and judgment of nonsuit signed. *Hutchinson* had obtained a rule nisi for an attachment against the plaintiff for non-payment of the sum of 103*l.* 10*s.*, the taxed costs of the cause and of the reference.

Chitty now shewed cause. The plaintiff is discharged by his certificate from paying the taxed costs of the cause, because the judgment relates back to the time of the trial, and the costs may therefore be proved under the commission. He cited *Harris v. Martyn* (a); *Morris v. Hart* (b), and *Beeston v. White* (c).

LORD TENTERDEN C. J. The rules deducible from all the cases are laid down in *Mr. Deacon's Treatise on the Law of Bankruptcy*; and after stating the rules applicable to cases where the plaintiffs have obtained verdicts, and the defendants have become bankrupt before judgment, he says, "With respect to costs upon a judgment of nonsuit, the statute (6 G. 4. c. 16.) is wholly silent, and making no provision whatever for the proof of a defendant's debts, whether on a judgment of nonsuit or judgment after verdict. It was, indeed, formerly determined, that where the nonsuit was before the bankruptcy of the plaintiff, the costs

(a) 5 T. R. 365.

(b) 1 Bos. & P. 134.

(c) 7 Price, 209.

might be proved, though the judgment was not obtained till afterwards, on the ground that the costs related back to the nonsuit, by virtue of which the debt might be said to exist before the bankruptcy. But this position is to be found only in two of the cases which were impugned by Lord Aldon in *Ex parte Hill* (a); and which were overruled in *Ex parte Charles* (b). And it has since been decided, that where a defendant obtains a verdict, and the plaintiff becomes bankrupt, before judgment is signed, the costs cannot be proved under the commission, on the principle that no debt arises in such case until judgment is signed, *Walker v. Barnes* (c). That, I think, is a correct statement of the decisions upon the subject. Now, here the plaintiff became bankrupt after the nonsuit, but before judgment was signed. The costs of the case did not constitute any debt until judgment was signed, for there is no distinction in this respect between a case where a defendant obtains a verdict, and one where the plaintiff is nonsuited. The verdict or nonsuit only entitles a defendant to tax his costs, but no debt arises, and no action can be maintained for them until judgment is signed. The case of *Walker v. Barnes* is a decisive authority to shew that the amount of these costs could not be proved as a debt under the plaintiff's commission; and if that be so, then he is liable to pay them. As to the costs of the reference, there can be no question. They clearly did not constitute a debt provable under the commission. The rule for the attachment for non-payment of the costs of the cause and of the reference must, therefore, be made absolute.

1826.
 ———
 Barnett
 against
 Tinsome.

(a) 11 Ves. 646.

(b) 14 East, 197.

(c) 5 Taunt. 778.

MILNERS (c)

J. B. H. & W. L. (c)

MILNERS (c)

1828.

*Saturday,
February 9th.*

Where a new charter was granted to an old corporation, the mayor and burgesses of *S.*, whereby it was granted, that there should be certain definite bodies, and an indefinite body of burgesses; and the definite bodies, and a majority of the burgesses, signified their desire to accept the charter either by acting under it, or by a written declaration of their assent: Held, that this was a valid acceptance.

Quere,
Whether it was necessary that the charter should be accepted by a majority of the burgesses?

A RULE had been obtained, calling upon *Hughes* to shew cause why an information, in the nature of quo warranto, should not be filed against him for usurping the office of mayor of *Stafford*. The affidavits in support of the rule stated the following facts. By a charter of the 12 *Jac.* 1., it was granted that the borough of *Stafford* should be a free borough, and that the bailiffs and burgesses should thenceforth be a body corporate, by the name of mayor and burgesses of the borough of *Stafford*, in the county of *Stafford*. That there should be one mayor, ten aldermen, and ten chief burgesses, and which should be called the common council of the borough, and the rule of government of the borough was vested in them. This charter was accepted by the corporation, and acted upon by them. The mayor of *Stafford* is the returning officer at the election of members of parliament for *Stafford*. *Hughes* was elected mayor on the 24th of October 1825, and held the office for one whole year, and on the 23d of October 1826, was re-elected, and held the office for a year after such re-election. On the 9th and 10th of June 1826, *Hughes* presided as returning officer at the election of members of parliament for the borough of *Stafford*. An information, in the nature of quo warranto, was filed against him, for taking upon himself the office of mayor by virtue of the election on the 23d of October 1826, whereupon judgment of ouster was given in *Easter* term 1827. In the year 1826, six aldermen and five capital burgesses

gesses presented a petition, signed by themselves only, to the king, stating that they were the only remaining aldermen and capital burgesses, and were not sufficient in number to constitute a legal meeting of the corporation for the transaction of business, and the ordinary government of the borough, and praying for a new charter, investing them and the burgesses of the borough with the same powers and privileges as they had before enjoyed under the charter of *Jac. I.* By letters patent, 5 G. 4., his majesty granted that the burgesses of *Stafford* should be a body corporate, by the name of mayor and burgesses of the borough of *Stafford*; that there should be one mayor, eleven aldermen, including the mayor, and ten capital burgesses, &c. as in the former charter. By the new charter, *Hughes* was nominated the first mayor to continue in office until *Monday* next after the feast of *St. Luke* 1828, and certain commissioners were named to administer the oaths to him. This charter was not at any time accepted, and on the contrary was rejected by the said burgesses. On the 8th of *October* 1827, the commissioners attended at the town hall, pursuant to notice, in order to administer the oaths to *Hughes*. A request was made by one *Flint*, on behalf of several burgesses, to have the question of acceptance or rejection of the charter put to the burgesses then present, but the commissioners refused. Almost all the burgesses then present retired into an adjoining room, where the question was put, and carried unanimously, that the charter should be rejected; and there were present on that occasion a majority of the burgesses of the borough. *Hughes* and all the other persons named in the charter as aldermen and chief burgesses, with one exception, took the oaths on that day.

1828.

The King
against
Hughes
James

1828.
The King
against
HUGHES.

day. On the 11th of *October*, *Hughes* acted as mayor, by presiding at an election of a town-serjeant: forty-nine burgesses polled on that day, and then the mayor adjourned the meeting to the 22d, and then again adjourned to the 23d, when the election was finished, 262 burgesses out of 820, the aggregate number, having polled. A meeting of the burgesses was called by *Flint* on the 11th of *October*, when those assembled again voted to reject the charter.

The affidavits in answer stated, that, besides the petition of the surviving aldermen and chief burgesses, 500 burgesses presented another petition, praying that the request in the former might be granted. These petitions were notorious in the borough, and a counter petition was procured by *Flint*, who canvassed for signatures to it. The first-mentioned petition was referred to the Attorney and Solicitor General, who appointed several meetings for taking it into consideration, when *Flint* attended with counsel, and the subject of the new charter was fully discussed by counsel on both sides, and the draft of the proposed new charter was at last settled and agreed upon by the counsel on both sides, with the exception of the names of the persons who should form the new common council, and as to that it was ultimately agreed that each party should send to his Majesty's privy council a list of the names of the persons proposed, and that the privy council should insert the names of such persons from the said two lists as to them should seem most proper. This agreement was acted upon, the lists sent in, and the new charter afterwards granted, bearing date *September 6. 1827*. The new charter was the same as the old, and contained nothing that was not in the draft before mentioned,

tioned, except the names of the common council, and some regulation as to serving on juries. At the meeting on the 8th of *October*, when the commissioners attended to administer the oaths to the mayor, there were not above 200 burgesses present, and not more than 100 of them went into the adjoining room upon the commissioner's refusing to put the question as to accepting or refusing the charter, and the charter was not then or at any other time rejected by a majority of the burgesses. At the meeting on the 11th of *October* for the election of a town-serjeant, a large party who were not burgesses attended, and obstructed the proceedings thereat, by very great violence and tumult, and by threats and insult prevented many burgesses from voting who were desirous of so doing, and for that reason the mayor thought it necessary to adjourn the meeting to the 22d. The business of the election was on that day again greatly obstructed in the same manner as before, and also on the 23d, to which day the proceedings were adjourned. On that day the election terminated, and in all 262 burgesses voted at the election. After the election, it was represented to the mayor that many burgesses had found it impossible to signify their acceptance of the new charter by voting at that election, in consequence of the violent proceedings before mentioned, and that they were desirous of signifying their acceptance of the charter; a book was therefore sent round with a written declaration of assent to the charter, and 129 resident burgesses and 100 non-resident, who had not voted at the election, signed this written acceptance of the new charter. The aggregate number of burgesses resident and non-resident was 820, of whom about 700 were resident; of these 591 had accepted the charter either by voting at the election

1828.

The Kings
against
Burgesses.

1822

The King
against
Hughes.

any specific form of acceptance; and, therefore, any unequivocal act, shewing a desire to accept a charter, ought to be held sufficient. The persons who signed this declaration were 129 resident, and 100 non-resident burgesses. In fact, then, the charter was accepted by the whole of the definite bodies, save one individual, and a majority of the burgesses resident and non-resident. The other objection is equally invalid: it depends entirely upon the stat. 9 Ann. c. 20. s. 3., which provides that no officer of a corporation who presides at the election of members of parliament, and makes the return, shall be capable of being elected into such office for two successive years. *Hughes* was not elected into the office of mayor of *Stafford* for the present year, but was appointed by the King, who is not bound by the statute.

Campbell contra. The acceptance of the charter in this case was absolutely necessary, in order to make it binding. Suppose this rule were made absolute, and an information filed, the defendant would be bound to aver, not only his appointment under the charter, but that the charter had been accepted. It is the prerogative of the crown to grant a charter, but it is the right of the subjects, to whom it is addressed, to accept or to reject it. Then how is a charter to be accepted? It has been contended, that acceptance by the select bodies named in the charter, and such of the indefinite body as choose to come in, suffices. All the authorities upon the subject are collected in *Bar v. Passmore*, and the result of them is, that the acceptance in this case could only be by a majority of the old burgesses, to whom the charter was addressed.

dressed. *Bagge's case* (a) is directly in point. The argument on the other side proceeds entirely on the assumption that the old corporation was dissolved. But that was not so, and this was not a charter to persons about to be incorporated for the first time. The charter of *Jac. 1.* recites, that the corporation had existed from time immemorial; and there is a great difference between a new charter granted to an old corporation and a charter of original incorporation. In *The Mayor, &c. of Colchester v. Seaber* (b), Lord Mansfield says, "The corporation is not dissolved by the judgments of ouster, and subsequent deaths of the mayor and aldermen; though they are without their magistracy, their constitution is not destroyed and gone; their former rights would remain. Would not a freeman of *Colchester* still continue to have a right of common, or to vote for members of parliament?" And in such cases, his Lordship says, it has never been disputed, but that new charters revive and give activity to the old corporation. The present charter then was addressed to 820 burgesses, all of whom had rights under former charters, of which they could not be deprived without their assent. It is true, that the new charter closely resembles the former one; but the question is the same as if they were totally different. In such a case it would be impossible to say, that the select body could, by their acceptance, make the charter binding in defiance of the indefinite body. There is no authority in favour of such an opinion, and reason is against it. At all events, therefore, the Court will not come to such a decision upon motion. If an acceptance by the indefinite body be necessary, the next question is, How their determin-

1858.

The Times
August
1858.(a) 1 *Roll. Rep.* 226. 2 *Brownl.* 100.(b) 3 *Burr.* 1870.

1880.

The Law
giving
Honor.

ation is to be determined? The burgesses being a still existing body, recognized by law, they who promoted the new charter should have called a meeting at which the senior alderman might have presided; and at such meeting the sense of the burgesses might have been ascertained, by a quasi corporate act. This would have been a much more fair proceeding than procuring the signatures of burgesses, which might have been done by fraud and misrepresentation. But, as to this situation of those who agreed to accept the new charter, there is much contradiction in the affidavits; it is therefore a question fit to be tried. At all events, if the charter has been accepted, that was not until long after *Hagler* was sworn in and began to act as mayor. He took the oath on the 6th of October. The election of town-serjeants, which is used as evidence of acceptance, by 200 burgesses, was not until the 29th; and many of the signatures of the assenting burgesses appear to have been obtained since this rule was granted. Then, as to the rule 9, *Ann. c. 20. s. 8.*, it is certainly true, that the words of it apply only to the re-election of corporate officers; but the intention of the legislature clearly was, that the same person should not fill the office for two successive years; and the re-appointment of *Hagler* to the office of mayor was directly at variance with that intention. Lord Tenterden, C. J. in *Lord of Bishop* that this rule might be discharged. It appears that the corporation of the borough of *Stafford* formerly consisted of about 800 persons, of whom nearly 700 were *freemen*. Other persons might acquire the right to become burgesses, by birth and purchase. By an act passed in the 12 *Ann.* the government of the borough was vested in the mayor, ten aldermen, and ten capital burgesses.

By

By institution, or some other cause which has not been explained, these definite bodies became so much reduced in numbers, that they were no longer capable of performing any corporate acts; and the government of the borough was, therefore, dissolved and gone. Whether the consequence of this state of things was that the Crown might, by *quo warranto*, have dissolved the corporation itself, we are not called upon to decide; but I agree that in the absence of any such proceeding, the existing corporators continued to possess their former rights, but without having the power to perform the duties imposed on them by their charters; and they possessed those rights for their own lives only, and in process of time the existence of the corporation would have been terminated by the natural death of the corporators. This being the state of the corporation, petitions for a new charter were presented to the Crown, signed by all the remaining members of the definite and governing bodies in the old corporation, and by 500 of the indefinite body of burgesses; a counter-petition was presented by a smaller number, who employed *Philp* as their attorney. The parties, with their counsel, met before the attorney and solicitor-general, and agreed to the form of the new charter. Then the nomination of the new mayor, and the new officers of the corporation, belonged to the Crown. Each party sent in a list of names, and his Majesty made a selection from them. These are the circumstances under which the charter was granted, and the single question to be decided is, this. Under what form were the burgesses bound to signify their assent to the charter? It is said that there should have been a public meeting, and a vote upon the question, whether it should be accepted or not, and if assented to, should not have been receivable and valid that

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that was absolutely necessary; the charter certainly has not been accepted. But no instance of any such meeting has been shown; nor has any authority or dictum that such a meeting was necessary been adduced. It has long been the received opinion that there must be an acceptance, but the mode of proving it has always been left open. In general, the acceptance of a charter has been proved by evidence of acting under it, and that is evidence in the case of a new as well as of an old charter. Now it appears by the affidavits in this case, that when the commissioners met on the day appointed for administering the oaths, there was a meeting, attended by a considerable number of burgesses. There are contradictory affidavits as to the assent of the persons there assembled, and it appears that a few days afterwards a large meeting was convened by *Mint*, who voted to reject the charter; but that determination so expressed was not binding upon any one of them; they might, notwithstanding all that then passed, alter their minds at a subsequent time, and accept the charter. Then, what was the next step? On the 11th of October there was a meeting for the election of a town-serjeant; many persons desirous of attending were prevented by violence, tumult, and threats; the meeting was, consequently, adjourned; the same course was pursued on the second day of the election, and a second adjournment became necessary; finally, however, 662 burgesses did actually vote at that election, and by that act showed their acceptance of the charter. The affidavits again state that, but for the violent and tumultuous interruption of the proceedings, many more of the burgesses would have attended, and that a written declaration of assent was handed about amongst them in a private meeting, and

and signed by 129 over and above the 362 who voted at the election. These two numbers constituted a majority of the resident burgesses, and the signatures of 100 non-residents, being a majority of that body, were also obtained in the same manner. The charter was, therefore, accepted by a majority of the whole body of burgesses. It is said that, if an acceptance of a charter is to be obtained in this private manner, a door will be opened for fraudulent practices. That may be true; but if those who wish to declare their assent publicly are deterred from so doing by violence, I know of no other mode by which they can counteract it, but by signifying their assent in private. We are not, therefore, called upon to decide that acceptance of a charter is not necessary; nor that acceptance by a reasonable number of burgesses would suffice, although there is much to be said in favour of that opinion. My judgment proceeds upon this, that in the absence of any known and settled mode of notifying the acceptance of a charter, that which was done in the present case was sufficient. With respect to the other objection to *Hughes's* title, it is perfectly clear that the statute 9 Ann. c. 20. does not apply: that was intended to prevent the re-election of certain corporate officers; and certainly is not binding on the Crown; although, doubtless, it is fit to be taken into consideration when a new presiding officer is to be appointed. As to the precise time when *Hughes* became mayor, I think that very immaterial to this case; it was not made a ground for the motion; and, inasmuch as the affidavits, upon which the rule was obtained, have not disclosed the whole of the case, but suppressed many material facts, I think that the rule should be discharged without costs.

1823.

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The King
against
Maurice

1828.

*The King
against
Hughes.*

BAYLEY J. I am entirely of the same opinion; there has been a valid acceptance of this charter by a majority of the persons to whom it was addressed. The situation of the corporation at the time when this charter was granted is not an immaterial feature in the case. According to former charters there was a local government for the borough; that was lost through neglect. It is supposed, that all the rights of the surviving burgesses nevertheless remain. For certain purposes their rights may remain; but, for the misconduct of the corporation, in not keeping up the governing body, I am of opinion that it might have been dissolved by *quo warranto*; and they who, at a meeting held in a tumultuous manner; at first voted for rejecting the new charter, might very probably change their opinion, and be desirous of accepting it, when informed that their privileges under former charters might be annihilated by the dissolution of the corporation. And accordingly we find, in a very short time afterwards, a majority of the burgesses signifying their acceptance of the charter, either in writing or by acting under it; and, in the absence of any authority fixing the mode in which the acceptance of a charter is to be signified, I think that which was done in the present case sufficed to shew an acceptance; and if that charter be now the governing charter of the borough, there can be no doubt that *Hughes* lawfully holds the office of mayor.

HOLROYD J. The crown certainly had a right to invigorate this corporation, by granting a new charter, and filling up the definite bodies, which had been suffered to be so much reduced that they were no longer capable of discharging their corporate functions. And when

when this new charter was offered it was not necessary to have a corporate meeting, to ascertain whether it should be accepted or not, the assent of the parties to whom it was addressed being sufficiently shown by acting under it. With respect to the other objection, I am satisfied that the stat. 9 Ann., c. 20, does not apply to an appointment by the crown under a new charter. Besides, *Hughes* was not, in fact, mayor for the year preceding the grant of the charter; he was elected, but afterwards ousted by *quo warranto*.

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Warrant
Ex. Kew
 against
Hughes

LITTLEDALE J. I entirely agree. The corporation were in such a situation that they could no longer perform the functions of a corporation. Their liberties, indeed, had not been seized by the crown, but, on the contrary, a new charter was granted. The crown thereby recognised the burgesses of *Stafford*, as they existed before, and certain corporate officers were nominated. They were not the corporation, but were appointed to execute certain duties in the corporation. It is, therefore, said, that acceptance of the charter by the corporation was necessary, in order to make it binding upon them. But by whom was this acceptance to be declared? On the one hand it is said, that acceptance by those named in the charter, or by so many as chose to come in and take the oaths under the charter, is sufficient. On the other hand, it was contended, that nothing short of an acceptance by the burgesses at large would be sufficient. I think an acceptance by those named only would not be good; but I am satisfied that acceptance by those persons, together with a majority of the burgesses, was a valid acceptance; and I do not mean to decide, that the concurrence of a majority of the

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burghesses was necessary. The next question is, How was the opinion of these parties to be ascertained? It may, in some respects, be convenient to hold a meeting for that purpose, but there is not any authority for saying that it is necessary; and, probably, the inconvenience attending such a proceeding would be greater than the convenience. At all events, I am of opinion, that any unequivocal act of the parties, shewing their assent to accept and be governed by the charter, is sufficient. Here, a majority of the burghesses, either by voting at an election, or by a deliberate declaration in writing, expressed such assent. That, I think, rendered the new charter the governing charter of the borough, and, consequently, *Hughes* is entitled under it to the office of mayor. The rule for an information against him must, therefore, be discharged,

Rule discharged.

The KING against The Justices of GLAMORGAN, SHIRE.

By a canal act, the company of proprietors were authorised to make the canal, and to do

BY an act of the 30 G. 3. s. 1., for making and maintaining a navigable canal from *Merthyr Tydvil*, to and through a place called the *Bank*, near the town of *Cardiff*, and the profits of the company on the money expended in completing the navigation was not to exceed 8 per cent. per annum; and in order to ascertain the clear amount of the profits of the navigation, the company were required to keep an account of the money laid out in making the canal, and of all charges incurred before the canal was completed, and also to make out an annual account, to be laid before the Justices at quarter sessions, of the rates, and of the charges attending the supporting, maintaining, and using the said navigation; and these accounts were to be laid before the Justices at quarter sessions, and they were to reduce the rates whenever the clear profits of the navigation exceeded 8 per cent. upon the money laid out: Held, that the company were authorised to widen and deepen the canal after it had been once completed (that being beneficial to the public), and that the charge of such widening and deepening was a charge attending the using of the canal.

S A E

Cardiff,

Curry, in the county of *Glamorgan*, certain persons therein named were made a body corporate, by the name of **The Company of Proprietors of the Glamorgan & Merthyr Tydvil Canal Navigation**, and they were authorised to make and complete a canal, navigable and passable for boats and other vessels from *Merthyr Tydvil*, through several places therein mentioned, and among others, to and through a place called the *Bank*, near to the town of *Curry*, and to supply the canal with water, &c. to make reservoirs, &c. And for those purposes the company were authorised to enter into and upon the lands or grounds of any persons, and to set out and ascertain such parts thereof, as they should think necessary and proper for making the canal, and all such other works, matters, and conveniences as they should think proper and necessary for effecting, completing, maintaining, improving, and using the said canal and other works, &c. Another part of the same clause authorised the company to make, set up, and appoint such towing paths, banks and ways, convenient for towing, haling, or drawing of boats or other vessels passing upon the said canal, and proper places for boats and other vessels navigating upon the canal, to turn, tie, or pass each other, and to do all other matters and things which they should think necessary and convenient for the making, extending, preserving, improving, completing, and using the canal and other works, in pursuance and according to the true intent and meaning of that act. Then by the forty-sixth section it was provided, that the clear profits to be received by the company from the navigation should never exceed 8 per cent. per annum upon all such money as should be expended in making and com-

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against
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Gloucester
County

pleting the navigation, and the several works relating thereto, and in defraying the expenses of obtaining that act; and in order to ascertain the amount of the clear profits of the navigation, they were thereby required to cause to be entered in a book, a true account of the charges and expenses attending the obtaining of the act, and all money laid out and expended in the making and completing the canal, and of all charges and expenses which should from time to time be incurred on account of the navigation and the several works thereto belonging, previous to and until the same should be made and completed; and they were required from *Michaelmas* next, after the expiration of two years from the time of completing the canal, to cause a true and particular account to be kept, and annually made up and balanced to the 29th of *September*, of the rates received by virtue of that act, and of the charges and expenses attending the supporting, maintaining, and using the said navigation, and the several works thereunto belonging; and the first-mentioned account of the charges and expenses attending the obtaining of the act, and of the making and completing the navigation and other works, and also every such annual account as aforesaid, were to be laid before the justices of the peace at the *Michaelmas* quarter sessions to be holden for the county next after the making up of every such annual account; and if by any such annual account it should appear to the justices that the clear profits of the said navigation should, upon the average of three years then next preceding, have exceeded the rate of 8 per cent. upon all such money as should appear by the first-mentioned account to have been laid out and expended as aforesaid, then the justices were authorised by an order

order to be made at such sessions, to make such reduction in the rates for one year then next as in their judgment would be sufficient; so that the clear profits of the navigation for that year might be as near 8 per cent. upon the money which should by the said first-mentioned account appear to have been laid out and expended as aforesaid as might be. By a subsequent act of the 36 G. 3., entitled "An act to amend an act of the 30 G. 3." (setting out the title of and reciting that act), the company were authorised to extend the canal from the *Bank* to the *Lower Layer*; and it was thereby declared, that the extension, when completed, should be deemed part of the canal, and all the powers contained in the recited act (so far as the same were applicable) should extend to the extension; and the company were authorised to raise a sum not exceeding 10,000*l.* for that purpose, for which they were to receive the same interest as on the residue of their capital, viz. 8 per cent. By section 3. it was enacted, "that the said several works aforesaid, and the said extension, and all other works whatsoever incident to the canal and extension to be made and done by virtue of the said recited act and that act, should in all things be finished and completed within the space of two years next after the passing of that act; and no part of the said sum to be raised as aforesaid should be applied in or towards defraying the expenses of doing or performing any of the works aforesaid, which should not be done within the space of two years." By section 4. the company were authorised to raise (if necessary for the purposes aforesaid) a further sum of money; but on that sum, so raised, the proprietors were not to receive more than 5 per cent. profit. In pursuance of the

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sittings.

directions contained in the 30 G. 3. the annual accounts of the company of proprietors of the rates collected by virtue of that act, and of the charges of supporting, maintaining, and using the navigation and the several works thereunto belonging, from Michaelmas 1823 to Michaelmas 1824, was presented to the justices at the Michaelmas sessions 1824, and was filed among the records of the court, and in that account there was a sum of 5961*l.* 11*s.* 10*d.* charged as disbursements, paid labourers, repairs, timber, expenses, and other contingent charges. At the ~~Michaelmas~~ ^{Michaelmas} quarter sessions 1827, one *R. Blackmore*, a freighter upon the canal, objected to some of the charges composing the said item, and applied to the justices to examine the said account, and he particularly objected to a charge of 400*l.*, which sum was stated to be laid out by the company in widening and deepening the canal at the wharf of Messrs. *Crawshay and Co.* The principal wharfs for loading vessels in that part of the canal near *Cardiff* were situate above the place called the *Bank*, but within the limits of the line of the canal authorized to be made by the act of parliament. The bank was fifty-five feet in width opposite certain wharfs of *Crawshay and Co.* The pressure of the trade, and the crowded state of the vessels lying there and at the wharfs adjoining, required more room. In consequence of its narrowness there, the navigation was so impeded that vessels could not lie and pass each other, and obstructions and delays from their landing, one against the other were constantly occurring. The freighters and owners of boats navigating the canal made repeated complaints to the company, and requested that that part of the canal might be widened and deepened.

ceed. And the company did in 1824 deem it requisite and convenient for the purposes of the navigation to widen and deepen the canal, and did accordingly cause it to be widened from twelve to fifteen feet at the said wharfs, for the distance of about 260 yards, and also caused it to be partially deepened below the same wharfs, and near to the *Sea Lock*, and the sum of 400*l.* was necessarily expended upon the works of widening and deepening that part of the canal. Upon the examination of the accounts before the justices, they made an order that the said sum of 400*l.* so charged for deepening and widening the canal in the said annual account from *Michaelmas* 1823 to *Michaelmas* 1824 should be expunged from and disallowed in the account. A rule nisi having been obtained, calling upon the justices of *Glamorganshire* to shew cause why a writ of *certiorari* should not issue, directed to them, to remove the order into this Court.

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The *Solicitor-General*, *Ludlow*, and *Russell* Serjts, next shewed cause. The sum of 400*l.* was properly expunged from the accounts, because the company had an authority under the act of parliament to charge that sum in the accounts laid before the justices. The expense incurred in widening and deepening the canal is not a charge attending the supporting, maintaining, and using the said navigation, and the several works thereto belonging; and by the forty-sixth section, such charges only can be included in the accounts laid before the sessions. It is true that the 80 G. 3. empowers the company to do all acts which they may deem necessary for (inter alia) improving the canal; but by section 46. the sessions can only allow charges attending the main-

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taining, supporting, and using the canal. Assuming, however, that the two sections are to be construed together, and that an expense attending the improving the canal may be allowed by the sessions, the word *improving* must be confined in construction to improvements made on the canal, as it was completed under the first act, and extended under the second. So construing the word, the company may execute new works, for the purpose of maintaining and improving the old line of canal; but they have no authority to make a new canal. This construction was put upon the act in *Rat v. Glamorganshire Canal Company (a)*. The deepening and widening was as to the increased depth and width, pro tanto, the making of a new canal, and adapting it to an entirely new purpose, by allowing vessels of a larger size to navigate it. The 36 G.S. shows clearly that the legislature did not intend to authorise the company to make new works, for it directs that the extended line of the canal to be made under that act shall be completed within two years. [Lord Tenterden C. J. As far as the question presented to us is concerned, that act is wholly immaterial. It relates only to works to be done for the purpose of extending the canal. The question before the Court is, first, Whether the company had authority by the first act to deepen and widen the canal? and, secondly, if they had, Whether the expense attending such a work be a charge attending the maintaining, supporting, and using the canal?]

Sir James Scarlett, Campbell, and Maule, contra. The

(a) 12 East, 157.

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shire.

expending of the legislature must be collected from the different clauses of the act, and not from an expression in one particular clause only. The company are authorised not only to make but to improve the canal; for they are to do all other matters and things which they shall think necessary for the making, extending, preserving, improving, completing, and using the said canal and other works. Then the forty-sixth section, which limits the amount of their profits, requires them to lay yearly before the sessions accounts of the charges and expenses attending the supporting, maintaining, and using the said navigation, and the several works thereunto belonging. Now it must have been the intention of the legislature that the company should be allowed the expenses of those works which they were enabled by the first clause to make; and by that section they were authorised to do all things which they might think necessary for improving the canal. Although the word *improving* is omitted in the forty-sixth section, still, giving a liberal construction to the words of that section, the expense of making an improvement which the public exigencies require, in order to enable them to have the full use of the canal, may be considered as an expense attending the using of the said navigation, because without such improvement it could not be used for those public purposes which the legislature intended. [Bayley J. If an act of parliament gave a power to persons to expend money for the supporting, maintaining, and using a road; they might expend money for lowering hills and filling up valleys.] The case of *The King v. The Glamorganshire Canal Company* (a) shews, that though the works be new in

(a) 12 East, 157.

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shire.

specie, yet if they are for the maintenance of the canal, the company are authorised to make them.

Lord TENTERDEN C.J. This case depends upon the construction of the act of parliament of the 30 G. 3. The question is, whether the sum of 400*l.*, which has been expended by this canal company in widening and deepening a part of the canal, is to be defrayed out of the 8 per cent. profits allowed to them upon their original expenditure, or whether it is to be brought into the annual account of general charges, the effect of which may be to postpone the time at which a reduction of the tolls for navigating this canal may be made for the benefit of the public. Now the act of the 30 G. 3. incorporates the canal company, and gives them a power to make and complete a navigable canal within specified limits, and to enter upon the lands of any persons, and to set out and ascertain such parts thereof as they shall think necessary and proper for making the said canal, and do all such other works, matters, and conveniences as they shall think proper and necessary for effecting, completing, maintaining, improving, and using the canal and other works. Then in another part of the same section the company are to do all other matters and things which they shall think necessary and convenient for the making, extending, preserving, improving, completing, and using the said canal and other works. The person who framed the act did not even in the same section always use the same language with reference to the same subject-matter. The word *improving*, however, occurs twice in that clause where the legislature is providing for the making of the canal. The forty-sixth section provides that the clear profits of the

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the company, to be derived from the navigation, shall not exceed 8 per cent. upon the money laid out and expended in making the same; and then, in order that the amount of their profits may be ascertained, the company are required, in the first place, to cause an account of the charges and expenses attending the obtaining of the act, and of all money already laid out and expended in making and completing the canal, and of all charges and expenses incurred on account of the navigation, and the several works thereunto belonging, previous to and until the same shall be made and completed; and they are also required to cause an account to be made up and kept annually, and balanced to the 28th of September, of the rates collected or received by virtue of that act, and of the charges and expenses attending the supporting, maintaining, and using the said navigation, and the several works thereunto belonging; and the question is, Whether the sum of 400*l.* is an item or charge of expense attending the supporting, maintaining, and using the navigation? Now these words, as it seems to me, ought to receive a liberal construction; and so construing them, I think that whatever expense has been incurred in doing any works deemed necessary for the convenient use of the canal, not merely by the proprietors themselves, but by those who are to navigate it, viz. by the freighters, may be considered an expense attending the using of the canal, within the meaning of this clause of the act of parliament. It is not denied that this widening and deepening of the canal was an act done at the request of the persons who navigated it. The deepening was convenient for the using of the canal, by admitting into that part of it vessels of larger burden than otherwise could have

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have been admitted, and the widening was convenient, also, for the using of the canal, by allowing vessels to pass each other in that part of the canal which they could not otherwise conveniently do. I am, therefore, of opinion that the expense of the widening and deepening may fairly be considered an expense attending the using of the canal, and, therefore, that it was an expense which might be brought into charge under this act of parliament, and that it ought to have been allowed by the sessions. This rule must, therefore, be made absolute.

BAYLEY J. The canal company, in the first instance, might have made the canal as wide and deep as they have now made it; and I see no reason why they may not, at this period of time, make it wider and deeper, if that be beneficial to the public. By widening and deepening it, they enable the public to make a greater use of the canal; and they therefore are doing an act tending to facilitate the use of the canal.

Rule absolute.

Monday,
February 11th.

Fox and Others against Jones.

The Court, in an action brought against the Marshal for an escape, compelled him or his officer to permit the attorney of the plaintiff to inspect the writ of habeas corpus, and return, and the commitment indorsed thereon.

THIS was an action against the defendant, as the Marshal of the King's Bench prison, for the escape of one *Frederick Howard Burnet*, who was a prisoner in his custody upon mesne process, having been committed to the custody of the Marshal by one of the Judges of this Court when brought before him by habeas corpus. A rule nisi had been obtained, calling upon the defendant upon

upon notice of the rule to be given to his attorney; and the clerk of the papers of the King's Bench prison, upon notice of the rule to be given to him or his deputy there, to shew cause why the plaintiffs' attorney should not be at liberty to inspect and take a copy of the writ of habeas corpus, and return thereto annexed, and the committitur of *Frederick Burnet* indorsed thereon, now in the custody of them or one of them. This rule was obtained upon an affidavit, stating that the plaintiff could not safely proceed to trial without having such inspection.

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against
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Sir James Scarlett and *Campbell* now shewed cause.

This is a rule calling upon the defendant to produce evidence against himself. In *Cooper v. Jones* (a), the Court refused to compel the Marshal to file of record a writ of habeas corpus cum causa, by which a person was committed to his custody in execution; and it was there said, that such writs, with committiturs thereon, had never been filed or kept by the Court or any of its officers, at *Westminster* or elsewhere, except in the office of the clerk of the papers in the King's Bench prison; but that the writ had always remained as any other warrant naturally would, in the hands of the officer to whom it was immediately directed, and whose voucher or authority for the act of detaining the party it properly was. It is, therefore, a private document, which the officer has a right to keep for his own security.

F. Pollock contra: Where the Court has jurisdiction, it will compel the production of any paper, in order to effectuate the purposes of justice. Now, in this case

(a) 2 M. & S. 202.

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against
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the defendant in the original action being brought before a Judge by a writ of habeas corpus, was committed to the custody of the defendant as an officer of the Court. It is necessary to aver that fact in the declaration, and if the proof does not correspond with the allegation, the plaintiff will be nonsuited. The defendant or his officer will be bound to produce the document at the trial; and the purposes of justice require that the plaintiff should be permitted to inspect the document before the trial, in order to prevent a nonsuit, and that being so, the Court will compel its production.

Lord TENTERDEN C.J. The rule in this case only calls upon the Marshal to permit the plaintiff's attorney to inspect the habeas corpus and the committitur. In *Cooper v. Jones (a)*, the rule called upon the Marshal to affile of record the writ of habeas corpus and committitur; and there being no instance of any such instrument having been filed of record, that rule was discharged. Now, as it is clear that the Marshal or his officer may be compelled to produce these documents at the trial, I think justice requires that the plaintiff's attorney should be permitted to inspect them, in order to adapt the allegation in his declaration to the proof. This rule must, therefore, be made absolute.

Rule absolute.

(a) 2 M. & S. 202.

1828

MALTBY and Another, Assignees of J. ELLIL, &
Bankrupt, against CARSTAIRS and Others.

ASSUMPSIT by the plaintiffs, as assignees of *J. Ellil*, to recover 1861*l.* 3*s.* 10*d.*, being the alleged surplus of the proceeds of certain securities, placed by the Bankrupt *Ellil*, before his bankruptcy, in the hands of Messrs. *Kensington* and Co. bankers, beyond the claim of *Kensington* and Co., and which surplus had been received by the defendants, in their character of assignees of *Kensington* and Co., who became bankrupts in the year 1812. The declaration consisted of a count for money had and received, and also the common money counts, a count for interest, and a count upon an account stated. Plea, the general issue, and notice of set-off, upon which issue was joined. At the trial before Lord *Tenterden* C. J., at the *London* sittings before *Michael-*

A. kept cash with *K.* and Co., bankers, who held securities for any balance which might become due to them, either for cash advanced to *A.*, or on bills of exchange drawn, accepted, or indorsed by him. Bills of exchange, accepted by *A.* for the accommodation of *E.*, *H.* and Co., were deposited in the hands of *K.* and Co. by *M.* an indorsee, as security for his promissory notes. *A.* be-

came bankrupt, and *E.*, *H.* and Co. entered into a deed of composition with their several creditors (the assignees of *A.*, as well as *K.* and Co., being parties to the deed). The deed recited that *E.*, *H.* and Co. had become indebted to various persons, and that several of the creditors of the copartnership were holders of bills of exchange, as securities for their debts owing to them by the said copartnership, which were drawn by, or on, or accepted or indorsed by *A.*, and that the provisions proposed to be made should be accepted by the creditors of the copartnership in full satisfaction of their debts, as well against *E.*, *H.* and Co. as against the estate of *A.*, in respect of the said bills of exchange drawn, accepted, or indorsed by them. By a clause therein, the creditors expressly released to *E.*, *H.* and Co., and to two of his sureties therein named (but not to *A.*), all bills of exchange, and covenanted to deliver up into the hands of the trustees (named in the deed) all such bills of exchange drawn, accepted, or indorsed by the copartnership of *E.*, *H.* and Co., or by *A.*, and all such other bills of exchange as they, the respective creditors, parties thereto, then held for the several debts due and owing to them respectively from the said copartnership of *E.*, *H.* and Co. *K.* and Co., in pursuance of the deed, delivered up to the trustees named in the deed the bills of exchange drawn by *E.*, *H.* and Co., accepted for their accommodation by *A.*; and *E.*, *H.* and Co., in settling accounts with the assignees of *A.*, delivered the bills to them. The claims which *K.* and Co. had on *A.*'s estate, for cash advanced to him, were satisfied out of the proceeds of the securities deposited by him in their hands, and there remained in their hands a surplus, after satisfying those claims: Held, that the composition-deed did not extinguish the debt due and owing from *A.* to *K.* and Co. upon the bills, although *E.*, *H.* and Co. were released, and therefore that *K.* and Co. might retain, in satisfaction of their claim against *A.* upon those bills, the surplus of the proceeds of the securities, which remained in their hands after satisfying the balance due to them for cash advanced.

1826.

—
MALTEY
against
CAMERAIN.

mas term 1822, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case: —

On the 4th *September* 1809 a commission of bankrupt issued against *J. Ellil*, late of *London*, lead merchant, who was duly found and declared a bankrupt, and the plaintiffs were assignees of his estate and effects under that commission. On the 23d *July* 1812 a commission of bankrupt issued against *John Pooley* and *E. Kensington*, *Styan*, and *Adams*, of *London*, bankers, who were duly found and declared bankrupts, and the defendants were assignees under that commission.

Mr. Ellil, prior and up to the period of his bankruptcy, kept a banking account with Messrs. *Kensington* and Co., who were in the habit of making advances of money to him, by way of discount and otherwise. As a collateral security to *Kensington* and Co. for any debt which might become due from *Ellil* to them, either with respect to transactions between them, or in respect of any bills bearing his name, of which they might, by any other means, become the holders, *Ellil*, from time to time, paid to them various bills of exchange; and also, by indentures of lease and release, dated the 26th and 27th *June* 1809, and made between *Ellil*, of the one part, and Messrs. *Kensington* and Co., of the other part, *J. Ellil* conveyed certain property, belonging to him, to *Kensington* and Co. The deed contained all proper powers of sale. At the time of *Ellil's* bankruptcy there was a cash-balance due from him to *Kensington* and Co. to the amount of 3574*l.* 1*s.*, and at that time, beside the property conveyed by the before-mentioned deeds of the 26th and 27th *June* 1809, the following bills of exchange, which had been deposited with them by *Ellil*

as a general collateral security to the same extent as before mentioned, remained in their hands, viz. ten bills drawn by *Ellil* upon and accepted by *Slade*, and one bill drawn upon and accepted by *G. Lewis*, for 949*l.* 7*s.*, but none of the said bills having the name of *Easterby, Hall*, and Co. thereon. *Ellil* was in the habit of accepting bills for *Easterby, Hall*, and Co.'s accommodation, and also for value, and at the time of his failure was under acceptances for more than 160,000*l.* for their accommodation. *Easterby, Hall*, and Co. had negotiated these bills to a considerable amount; and *Atkinson* and *Mount* of *Broad Street* became the holders of some of these bills, amounting to 18,200*l.*, which they, before the bankruptcy of *Ellil*, deposited with Messrs. *Kensington* and Co., who were their bankers, as collateral securities for their own notes of hand discounted by Messrs. *Kensington* and Co. All demands which *Kensington* and Co. had against *Ellil* on transactions with him were satisfied out of the proceeds of the property conveyed by the deeds of the 26th and 27th *June* 1809 (which property was sold), in that year, after *Ellil*'s bankruptcy, by the plaintiffs, who applied to *Kensington* and Co. for their consent to sell for 6000*l.*, which they gave on condition that all the proceeds should be paid to them on *Ellil*'s account, and it was so agreed, and they accordingly received the deposit; and the plaintiff *Maltby*, afterwards, on the 18th *April* 1812, paid to *Kensington* and Co. out of the said proceeds 4000*l.*, which overpaid the cash balance due to *Kensington* and Co. by 425*l.* 10*s.* The defendants have also, since the bankruptcy of *Kensington* and Co., that is, in 1814, received the balance of the said proceeds, and they have also received from the

1828.

MALBY
against
CARRIAGE

1828.
 ———
 Maltby
 against
 Kensington

parties upon the bill accepted by *Leitch* a further sum of 282*l.* 1*s.* 1*d.* The sums so received by the defendants, beyond what would be necessary to satisfy the cash balance due from *Ellis*, as aforesaid, amounting together to 1861*l.* 8*s.* 10*d.*; and which last-mentioned sum of 1861*l.* 8*s.* 10*d.* the plaintiffs sought to recover by the present action. The defendants insisted upon a right to retain that sum in respect of a demand upon the bills of exchange deposited as aforesaid by *Atkinson* and *Mount* exceeding that amount. Prior to *Ellis's* failure *Kensington* and *Co.* were the bankers of *Atkinson* and *Mount*, and had discounted for *Atkinson* and *Mount* their promissory notes of hand, receiving from *Atkinson* and *Mount*, by way of collateral security, bills of exchange to a very large amount, among which were bills amounting to the sum of 18,200*l.*, drawn by *Bastinby, Hall*, and *Co.* upon, and accepted by, *Ellis*. *Atkinson* and *Mount* failed; and at the time of *Ellis's* bankruptcy *Kensington* and *Co.* held the said bills, accepted by him for 18,200*l.*, as a collateral security for *Atkinson* and *Mount's* account. After *Ellis's* bankruptcy, *Bastinby, Hall*, and *Co.* became embarrassed in their circumstances, and found it necessary to make an arrangement with their creditors, and amongst them were *Kensington* and *Co.*, who were creditors upon the bills so held by them as aforesaid. The arrangement so made was carried into effect by a deed dated 23*d* June 1841, and to which the plaintiffs were parties as creditors of *Bastinby, Hall*, and *Co.*, and likewise *Kensington* and *Co.* and several other persons.

The deed purported to be made between *George Edmonds*, *Anthony Bastinby*, *Walter Hall*, and *Fredenick Hall*, merchants and copartners, trading under the firm

of

of *Easterby, Hall, and Co.* of the first part; *Arthur Mambrey, Joseph Barker*, and several other persons, the assignees of the estate and effects of *Asbourn Surtees and John Surtees*, at that time bankrupts, of the second part; *Ed. Mambrey, G. L. Hollingworth*, and several other persons, bankers in the city of *Durham*, of the third part; *Ed. Puller* the elder and *Ed. Puller* the younger, both of the city of *London*; merchants and copartners, of the fourth part; *Ed. Skelton*, of the fifth part; *Sir J. C. Edipsey*; *Bart. G. Simson*, and the said *A. Mambrey*, of the sixth part; the several persons, creditors of the said copartnership of *Easterby, Hall, and Co.*, who should contain the deeds of the seventh part; *T. Malby, T. H. Maisterman*, and *S. Anson*, assignees of *J. Ellis*, of the eighth part.

By this deed, after reciting that *G. Doubleday, A. Bamber, W. Hall*, and *F. Hall*, together with the said *A. Surtees* and *J. Surtees*, had established a copartnership for working mines; and that they had become entitled to a great variety of mining property in *Durham*, and in various other places, by virtue of several leases; and that to enable them to carry on the mining concern, they became indebted to various persons in large sums of money on account of that partnership of *Easterby, Hall, and Co.*; and that for the payment of their creditors of the seventh part this deed was executed. That *Easterby, Hall, and Co.*, on the 10th July 1802, assigned to *Henry Twining*, by way of mortgage, the premises comprised in five of the leases, part of the said copartnership property, for securing the repayment to him of £5000, which had been advanced by him to the partnership; that on the 4th of July 1806, the two *Surtees* became bankrupts, and by their bankruptcy the copartnership

1838.
MAMREY
against
CARROLL

1828.

MALLET
against
CAMERON.

carried on under the firm of *Easterby, Hall, and Co.*, was, so far as respected the two *Surtees*, dissolved; and that by indenture of assignment bearing date the 13th May 1808, and made between *G. Doubleday, A. Easterby, W. Hall, and F. Hall* of the one part, and *A. Mowbray* and the other partners of the *Durham* bank of the other part, reciting, among other things, that *A. Mowbray* and the other partners of the *Durham* bank had advanced for the use of *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, various sums of money by or upon the discount of bills of exchange drawn by them on the several persons therein mentioned; and had agreed, in case the occasions of *G. Doubleday, A. Easterby, W. Hall, and F. Hall* should require it, to discount other bills of exchange to be drawn and accepted as therein is expressed: it was witnessed, that in consideration of the premises, and for the other considerations therein expressed, the several undivided parts or shares of the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, of and in the several mines and hereditaments, and shares of mines and hereditaments, therein particularly described, and also the entirety of various messuages, closes, lands, and hereditaments therein also described, (being part of the said leasehold mines and premises of and belonging to the said copartnership of *Easterby, Hall, and Co.*) were assigned by the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, unto the said *A. Mowbray* and the other partners of the *Durham* bank, for the respective residues of the several terms of years comprising the same premises respectively, upon various trusts for securing the payment, liquidation, and redemption of the several sums of money theretofore advanced or thereafter to be advanced by the said *A. Mowbray* and the other

other partners of the *Durham* bank, for the use or on the account of the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, by way of discount upon other bills of exchange, with the usual interest, and with such powers and authorities in the respective events therein specified, to enter and take possession of the premises, and work and conduct the same; and also to sell and dispose of the same, for the purposes of the said security as therein mentioned; and subject to the said security upon trust for the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, their executors, &c. It then recited that a considerable sum of money remained due to the said *A. Mowbray* and the other partners of the *Durham* bank, by virtue of the trusts and provisions of that assignment, and that since the bankruptcy of *A. Surtees* and *J. Surtees* the mining concern had been continued and conducted by the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, under the firm of *Easterby, Hall, and Co.*, without any interference therein by *A. Surtees* and *J. Surtees*, or either of them, or their assignees, and without any final settlement of the accounts of the said partners touching the said joint concern up to the time of the said bankruptcy; and that *G. Doubleday* and *A. Easterby, W. Hall* and *F. Hall*, had since expended large sums of money in the discharge of many of the subsisting debts and engagements contracted by the copartnership prior to that period, and had in consequence of such payments, and of the great advances necessary to be made, and which had been made by them, for carrying on the mining concern, become indebted to various persons in large sums of money, and among others, to *R. Puller* the elder, and *R. Puller* the younger, for and in respect of divers

1828.

~~MALIN~~
against
CARSTAIRS

1828.

—
 MASTBY
 against
 CARSTAIR.

sums of money advanced by them to or on account and for the accommodation of the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, as continuing copartners as aforesaid; that the two *Pullers* did then lately, at the request and for the accommodation of *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, become liable and engaged to many of the several persons parties to the deed of the seventh part, being creditors of the mining concern, for the payment to them of several large sums of money, by drawing, accepting, or indorsing in their favour bills of exchange for the respective amounts of the same sums of money, all which bills of exchange had become due, but that *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, and *R. Puller* the elder, and *R. Puller* the younger, were respectively unable to take up and discharge the same; and that several of the creditors of the said copartnership of *Easterby, Hall, and Co.* were holders of bills of exchange, as securities for their debts owing to them by the said copartnership, which were drawn by or on, or accepted or indorsed by the said *John Ellis*, and of other bills of exchange drawn by or on, or accepted or indorsed by Messrs. Atkinson and Mount, of Broad-Street Buildings, London, merchants, — all which bills of exchange were then due; and that a commission of bankrupt had been lately issued against the said *J. Ellis*, under which he had been declared a bankrupt, and the said *Thomas Maltby, T. H. Masterman, and S. Brown*, had been duly chosen assignees of his estate and effects; and that the account-current between the said *J. Ellis* and the said copartnership of *Easterby, Hall, and Co.* had not been made up and settled, and it was then uncertain in whose favour the balance of such accounts would

would appear, upon the final adjustment thereof; but, in consideration of the provisions thereafter contained for the discharge of the debts of the said copartnership of *Easterby, Hall, and Co.*, including the sums of money due and owing upon and secured by the said bills of exchange, drawn, accepted, or indorsed by the said *J. Ellil* as aforesaid, the said assignees of his estate and effects had, with the consent of his creditors for that purpose obtained, agreed to accept payment of such sum of money, if any, as should or might appear to be due to his estate, upon the balance of the said last-mentioned accounts, in the order and course, and pursuant to the trusts and directions thereafter contained; and that the assignees of the two *Surtees*, with the consent of the creditors of the said bankrupts, were empowered and had agreed to accept the sum of 10,800*l.*, in lieu and satisfaction of the shares and interests of the said bankrupts, and of the said assignees in right of the said bankrupts, in the said leasehold premises, and of and in all other the real and personal estates of or belonging to the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, and the said *A. Surtees* and *J. Surtees*, as copartners as aforesaid; which 10,800*l.* was to be considered as a debt due from the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall* to the assignees of the said bankrupts (the *Surtees'*) parties thereto, of the second part, and to be paid to them as thereafter mentioned; and it had been further agreed, that the said assignees should come in and take a dividend in respect of any balance which might be due to them, as assignees of Messrs. *Surtees, Burdon, and Co.*, from the said copartnership of *Easterby, Hall, and Co.*, rateably and in the order with the other creditors of the said

1828.

~~Messrs~~
~~Surtees~~
CARPENTERS.

1821:

*Messrs
against
Messrs.*

copartnership, parties thereto, of the seventh part; and that it had been agreed between G. Doubleday, A. Easterby, W. Hall, and F. Hall, that the partnership of Easterby, Hall, and Co. should be dissolved from that time; and in consequence of the dissolution of the said copartnership it had been agreed, between G. Doubleday, A. Easterby, W. Hall, and F. Hall, with the consent of the assignees of the two Surtees, and with a view to make a provision for the payment of the debts of the said copartnership, and to wind up and finally settle the concerns of the said copartnership, that the mines and the other household premises thereafter mentioned, subject to the rents and covenants payable and to be performed in respect thereof, and also to the said mortgage made to the said H. Tyndall for the said sum of 3000*l.*, and all the engines, machinery, &c. &c., should be sold; and that the several provisions proposed to be made were respectively intended to be, and should be accepted and taken by the several and respective creditors of the said copartnership, in full satisfaction and discharge of their respective debts and demands, as well against the said G. Doubleday, A. Easterby, W. Hall, and F. Hall, respectively, as against the said R. Puller the elder, and B. Puller the younger, as against the estate of the said J. Ellil, or against the said Messrs. Askinson and Mount respectively, in respect of the said bills of exchange drawn, accepted, or indorsed by them, or any of them respectively, and then remaining over due with the names of the said Easterby, Hall, and Co. or Hall and Co. thereon, all which bills of exchange were to be delivered up by the respective holders thereof, to be cancelled upon receiving debentures under the hands of the trustees of the said trust funds, for the amount of their respective debts payable

payable to the bearer pursuant to the proviso therein-
 after contained; but nothing therein contained was in-
 tended to operate as a release and discharge to any other
 person or persons, save only and except the said *G.
 Doubleday, A. Eusterby, W. Hall, and R. Hall, B. Pidler*
 the elder and *B. Pidler* the younger, and the said *Messrs.
 Atkinson and Mount*, and the estate of the said *John
 Elliot*; and that in order to facilitate and promote the
 said intended arrangements, and as a further consider-
 ation and inducement for the acceptance of the other
 creditors of the said copartnership of *Eusterby, Hall,*
and Co. of the said proposed proviso for the payment
 of their debts in full discharge thereof as aforesaid, the
 said *A. Minobray* and the other partners of the *Durham*
bank had, at the request of the said *G. Doubleday, A. Eus-*
terby, W. Hall, and R. Hall, consented and agreed wholly
 to waive, relinquish, and give up all benefit, priority, and
 advantage whatsoever, to which they the said *A. Min-*
obray, &c. were entitled under and by virtue of the trusts
 and provisions of the said in part recited indenture of
 assignment of the 13th of May 1808, in respect of the
 debts due and owing to them from the said last-men-
 tioned copartnership; and the said *Sir J. C. Hippley, G.
 Simpson, and Arthur Minobray*, having been nominated
 and appointed by the several parties interested in the
 said proposed arrangements to be trustees for carrying
 the same into effect and execution, it was witnessed
 that in further pursuance of the said several proposals
 and agreements thereinbefore recited, and for carrying
 the same into further effect and execution, and in con-
 sideration of the premises, it was thereby declared and
 agreed by and between all the said parties to that deed,
 and particularly the said *G. Doubleday, Anthony Eusterby,*

W. Hall,

1808

Witness
 my hand
 and seal
 this 1st day
 of May 1808

1896.

—
 MASTER
 ROBERT
 GASTALD.

W. Hall, and *R. Hall*, did thereby agree, declare, and direct, that the said *Sir J. G. Hippesley, G. Simes*, and *A. Manby*, their executors, administrators, and assigns, should stand and be possessed of 146,000*l.*, being the purchase monies for twenty-seven fifth shares of the said mines and premises, and of said in the interest to become due for the same upon trust, in the first place, thereunto pay and retain the costs of carrying the said arrangements into effect; and in the next place, thereunto pay to the said *A. Manby, J. Bulmer*, and others, as assignees of *Messrs Simes* as aforesaid, their executors, from the sum of 10,000*l.*, and upon trust, immediately thereafter to apply the ultimate residue or surplus of the said 146,000*l.* and interest, so far as the same should extend in payment to the several creditors of the said partnership of *Easterby, Hall and Co.* (except the *Bellers* and the assignees of *Ellis*), excepting only as to such assignees of *Ellis* in regard to the matter thereinafter particularly mentioned, of so much more rateable and equal dividend or dividends upon the amount of the several and respective debts and claims of money justly due and owing to them, the same creditors respectively; and also the said *G. Doubleday* and *Ed. Easterby*, by their executors, &c. of one or more rateable and equal dividend or dividends upon the said sum of 15,000*l.*, agreed to be paid to them as aforesaid, so much dividends to be made in a just and equal proportion to the amount of the same debts and claims respectively, without any priority of any one or more of them to any other or others of them, it being the intention and agreement of the parties thereto, that the 15,000*l.* should be paid to *G. Doubleday* and *Ed. Easterby*, with the debts of the said partnership

of

of *Easterby, Hall, and Co.* thereby provided for; and it was thereby agreed, that whereas Messrs. *Kensington and Co.*, Messrs. *Harding and Hill*, and Messrs. *Loper and Collins*, lately received respectively several sums by and out of the estate of *J. Ellis*, it was thereby declared that a dividend ratably with the other creditors should be paid out of the said 146,000*l.* to the said assignees of *J. Ellis* upon the said several sums so received by *Kensington and Co.*, *Harding and Hill*, and *Loper and Collins*, out of the estate of *J. Ellis*, and whereby the said estate had been diminished; but not upon any other sums or balance; and it was expressly agreed and declared between and by the said parties, that the several trusts and provisions thereinbefore contained for payment of the debts of the said copartnership of *Easterby, Hall, and Co.* were to be forthwith accepted and taken by the several and respective creditors thereof, in full satisfaction and discharge of their respective debts and demands; and that in case any one or more of the creditors for the time being of the said copartnership of *Easterby, Hall, and Co.*, or of the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, as continuing partners therein, should, upon request for that purpose made by the said trustees or trustee for the time being, neglect or refuse to execute the indentures, or if any such creditor or creditors having notice of the trusts and provisions therein contained, should commence, prosecute, continue, or carry on any actions or suits or other proceedings whatsoever, either at law or equity, for the recovering of all or any part of the debt or respective debts due and owing to the same creditor or creditors respectively, either against the person or effects of them the said

G. Double-

.1803.

MASTERS
OF THE
CHANCERY

1838]

Minor's
against
Creditors.

G. Doubleday, A. Easterly, W. Hall, and F. Hall, or any of them, or any of their heirs, executors, or administrators, or against the said *R. Puller* the elder and *R. Puller* the younger, or either of them, their, or either of their executors, administrators, or the estate of the said *J. Billi*, then the creditor or creditors so neglecting, refusing, or declining to execute these presents, or commencing or continuing any such action, &c. after notice thereof as aforesaid, and his, her, or their respective executors and administrators, should be wholly excluded and debarred from taking any benefit under the trusts and provisions thereinbefore contained, or any of them; and the dividend or respective dividends to which such creditor or creditors, his, her, or their executors or administrators, would have been entitled from time to time, in case he, she, or they respectively had executed that indenture, should be retained and set apart by the said trustees for the time being, and invested in their or his names or name in or upon government securities, at interest, and should constitute a fund for indemnifying and reimbursing the several and respective persons liable or responsible to, or for the payment of the debt or respective debts upon which such dividend or dividends should be made, and their respective estates and effects, for or in respect of all such sum and sums of money, loss, costs, charges, and expenses as they respectively should pay, suffer, expend, or be put unto for or by reason of such debt or respective debts, and all actions, suits, &c. in respect thereof, and should be paid, applied, and disposed of accordingly, for answering the purpose of the said indenture from time to time, as occasion should require.

And the indenture further witnessed, that the said several

several persons parties thereto, of the third and seventh parts, being respectively creditors of the said copartnership of *Easterby, Hall, and Co.*, did testify his, her; and their respective assent to and approbation of the said indenture, and the said recited indenture of assignment bearing even date therewith, and the trusts and provisions in and by the same indentures respectively created, expressed, and contained, for payment of the debts due and owing from the same copartnership; and in consideration of the said trusts and provisions, all the said several persons parties thereto, of the third and seventh parts respectively, had fully and clearly remised, released, acquitted, exonerated, and discharged the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, and also the two *Pullers*, and each and every of them, their, and each and every of their heirs, executors, administrators, and assigns, of and from all and singular the debts, sums of money, and demands whatsoever which then were due and owing to them the said several creditors parties thereto, of the third and seventh parts respectively, from the said copartnership of *Easterby, Hall, and Co.*, or the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, as continuing partners, or the said *A. Surtees* and *J. Surtees*, as late partners therein, and jointly or severally, or the said *R. Puller the elder*, and *R. Puller the younger*, or either of them, upon any account whatsoever, and of and from all judgments, bonds, bills of exchange, promissory notes, and other securities made, given, or entered into, for securing the payment of the same several debts and sums of money respectively, or any of them, and also of, and from all and all manner of actions, suits, and other proceedings, claims, and demands whatsoever, which they the said several creditors parties thereto, of the third and seventh parts respectively,

1828.

Married
against
Covenant.

1828.

MALBY
against
Debtors

spectively, or any of them, had claimed or were entitled to, or might or could have claim or be entitled to, against the said firm of *Easterby, Hall, and Co.*, or the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, as continuing partners, or the said *A. Surtees and J. Surtees*, as late partners therein, or any of them, or any of their joint or separate estates and effects, or any part thereof respectively, or against the two *Pullers*, or either of them, or by reason of the said several debts or sums of money, or any other matter, cause, or thing whatsoever, relating to the said copartnership or the concerns thereof, antecedently to the date and execution of the said indenture, subject and without prejudice, nevertheless, to the claims and demands of the said creditors respectively, under and by virtue of the trusts and provisions thereinbefore contained.

And this indenture likewise witnessed, that the said *T. Malby, T. H. Mastorman, and S. Brown*, assignees of the estate of *J. Ellis*, so far as they had any interest in the premises, did thereby testify their assent to and approbation of this indenture, and the said recited indenture of assignment bearing even date therewith, and the trusts and provisions in and by the same indentures respectively contained; and in consideration thereof, they the said *T. Malby, T. H. Mastorman, and S. Brown*, remised, released, acquitted, and discharged the said *G. Doubleday, A. Easterby, W. Hall, and F. Hall*, and each and every of them and their respective executors and administrators, and also the said *R. Puller the elder* and *R. Puller the younger*, and each of them and their heirs, executors, and administrators, of and from all debts, sums of money, bills, notes, accounts, and demands whatsoever, if any such there were, which were then due and owing to them, as assignees aforesaid, from the said

G. Double-

G. Doubleday, A. Easterby, W. Hall, and F. Hall, or any of them, or from the said R. Puller the elder, and R. Puller the younger, or either of them; subject, nevertheless, to the claims and demands of the said T. Matby, T. H. Masterman, and S. Brown, under and by virtue of the trusts and provisions thereinbefore and after contained, in the event of their being creditors of the said copartnership of Easterby, Hall, and Co., upon such investigation of accounts as thereinbefore alluded to; provided always, and in order the more effectually to provide for the accommodation and security of the respective creditors of Easterby, Hall, and Co., it was expressly agreed and declared, by and between all the said parties thereto, that it should be lawful for Sir J. C. Hippesley, G. Simson, and A. Mowbray, or the trustees for the time being, to sign and deliver to all and every the said creditors, parties hereto, of the second, third, seventh, and eighth parts respectively, debentures or certificates of acknowledgment for the amount of their several and respective debts, provided and secured to be paid under the said trusts and provisions thereinbefore contained, or for any part or parts of the respective debts or claims of the same several creditors respectively, which should be admitted to be due; such debentures to represent the respective debts or sums of money for which the same should be signed and issued as aforesaid, to be made payable to the bearer, by and out of the respective trust funds thereby provided and established for the payment of the said debts; and each and every of the creditors, parties thereto, of the second, third, seventh, and eighth parts, did thereby for himself, his heirs, executors, or administrators, covenant to and with the said Sir J. C. Hippesley, G. Simson, and A. Mowbray, their

executors,

1828;
 MARCH
 against
 CARRIAGE

1828.

Mitchell
vs
Robert
Edwards

executors, administrators, and assigns, that when and so soon as that indenture, and the said indenture of assignment, bearing even date therewith, should have been executed by the said *G. Doubleday*, *R. Enderby*, *W. Hall*, and *F. Hall*, and such indentures or certificates should have been signed or issued by the said trustees for the time being in manner aforesaid, they the said several and respective creditors, parties thereto of the second, third, seventh, and eighth parties or their respective executors, administrators, or copartners, should, immediately upon receiving such certificates for the amount of their respective debts, or having the same tendered to them respectively, give and deliver up the same to the hands of the said trustees for the time being, or for any person or persons duly authorized by them in that behalf, all such bills of exchange drawn, accepted, or indorsed by the said copartnership of *Enderby, Hall, and Co.*, or *Hall and Co.*, or by the said *R. Puller* the elder, and *R. Puller* the younger, or by the firm of *C. and R. Puller*, or by the said *J. Bick*, or by the said *Messrs. Atkinson and Mount* respectively; and all such other bills of exchange or promissory notes whatsoever, as they the several and respective creditors, parties thereto, of the second, third, seventh, and eighth parties then held, or were entitled to, for the several debts then and owing to them respectively from the said copartnership of *Enderby, Hall, and Co.*, or any part of said debts respectively, save only and except those bills of exchange whereon there were the names of other persons than of the said *Enderby, Hall, and Co.*, or *Hall and Co.*, or *C. and R. Puller*, and *Atkinson and Mount*, and *J. Bick*, or any of them, they or any of their clerks or agents

Washington

Kensington and Co. refused to execute this deed upon the application of *Easterly* and Co., until they obtained the following letter from *Ellis's* assignees: "13th March 1812. Gentlemen, We consent to your executing the deed of arrangement of Messrs. *Easterly, Hall, and Co.* with their creditors, without prejudice to your security on the premises late belonging to Mr. *Ellis* at *Bankside*." Upon which *Kensington* and Co. in pursuance of this letter on the same day executed the deed.

After the execution of the deed, and in pursuance thereof, *Kensington* and Co. gave up the bills accepted by *Ellis*, amounting to 18,200*l.*, with various others amounting to 47,228*l.* 2*s.* 1*d.* to *Easterly* and Co. and received from the trustees under the deed a receipt and a debenture, stating that *Kensington* and Co. were holders of bills drawn by *Easterly, Hall, and Co.* to the amount of 18,200*l.*, on which they had advanced monies to various persons to the amount of 22,857*l.* 10*s.* 1*d.*, and that they had given up such bills, and executed the deed of arrangement, whereupon this debenture was given to *Kensington* and Co. to secure payment of the said sum of 22,857*l.* 10*s.* 1*d.* by dividends in proportion to the sum of 47,228*l.* 2*s.* 1*d.*, the amount of the bills so given up, until the same should be paid out of the trust funds provided by the deed of arrangement. Certain payments have been made on the debenture, amounting to 6*l.* in the year upon the said sum of 47,228*l.* 2*s.* 1*d.* After execution of the deed of arrangement, the accounts between *Ellis's* estate and *Easterly, Hall, and Co.* were referred to arbitration, and an award was made, stating, among other things, as follows: viz. "That it likewise

1809.
JAMES
MAYOR
against
KENSINGTON

1828.

—
 MALLET
 against
 CAMERON.

appears to us (the arbitrators) that Mr. *Ellil* has accepted for *Easterby, Hall, and Co.* bills to the amount of 166,886*l.* 2*s.* 3*d.*, not any part whereof is included in the before-mentioned balance, and that *Easterby, Hall, and Co.* must either deliver up to the assignees of Mr. *Ellil* all the said bills, or account for the same." After the above award the plaintiffs and *Easterby, Hall, and Co.* arranged the account, and upon that occasion the bills drawn by *Easterby, Hall, and Co.* upon *Ellil* amounting to 18,200*l.* before mentioned, were delivered up by *Easterby, Hall, and Co.* to the plaintiffs, and the account settled accordingly, and such bills have ever since remained in the plaintiffs' hands.

This case was argued on a former day in this term by

F. Pollock for the plaintiffs. The debt due from *Ellil*, for cash advanced to him by *Kensington and Co.* having been satisfied, and the bills of exchange to the amount of 18,200*l.* drawn by *Easterby, Hall, and Co.* upon and accepted by *Ellil*, having been delivered up by *Kensington and Co.* to *Easterby, Hall, and Co.* whereby the latter were enabled to settle their accounts with the assignees of *Ellil*, as if those bills had been fully satisfied, *Kensington and Co.* cannot, on account of those bills, retain, as against *Ellil's* estate, any money in their hands belonging to his estate. First, the deed of the 23d of June 1811, to which the plaintiffs and *Kensington and Co.* were parties, operated as an extinguishment of any debt due from *Ellil* or his assignees to *Kensington and Co.* upon those bills of exchange. Secondly, the letter of the 19th of March does not operate as a waiver of any benefit which the plaintiffs,

as

as assignees of *Ellil's* estate, would otherwise have derived under that deed. The principal object of the deed undoubtedly was to provide a fund for the payment of the debts of *Easterby, Hall, and Co.*; but it contains a recital that the several provisions proposed to be made shall be accepted by the respective creditors in full satisfaction of their debts, as well against *Easterby, Hall, and Co.* as against the *Pullers*, or against the estate of *J. Ellil*, or against *Atkinson and Mount* respectively; and it provides that the deed shall not operate as a release of any other person except *Easterby, Hall, and Co.*, the *Pullers*, *Atkinson* and *Mount*, and the estate of *J. Ellil*. The deed, therefore, is to operate as a release of *Ellil's* estate. By another clause, after reciting that *Kensington and Co.*, and several other persons, had received several sums out of the estate of *Ellil*, it is provided that a dividend should be paid out of the £46,000. to the assignees of the said *J. Ellil*, upon the sums so received by those persons. By a still later clause the creditors covenant, on receiving adventures from the trustees, to deliver to the trustees all bills of exchange drawn and accepted by *Easterby, Hall, and Co.*, or the *Pullers*, or by *J. Ellil*, or by *Atkinson and Mount*. *Kensington* did, in pursuance of this covenant, deliver to the trustees of *Easterby, Hall, and Co.* the bills of exchange, and thereby enabled the latter to settle their accounts with the assignees of *Ellil* as if those bills were satisfied; and they have been delivered up to the latter. *Kensington and Co.*, by delivering up the bills of exchange, and accepting the provisions made by the deed in full satisfaction of all claims against *Ellil*, have agreed that all debts owing to them by *Ellil*, or his assignees, on those bills should be extinguished.

1828.

MALINS
against
CARPENTERS

extinguished. The case of *Ex parte Curstons* (a) will be relied upon by the other side. The question there arose as to *Slade's* bills, which were treated as bills accepted for value, and therefore transferring to *Kensington* and Co. *Slade's* debts to the drawer. The Vice-Chancellor was of opinion that the debt due from *Slade* and Co. on these bills was extinguished by the deed. But Lord *Eldon* was of a different opinion, and allowed *Kensington* and Co. to prove those bills under *Slade's* commission. The authority of that decision is not intended to be disputed; but the case is distinguishable from the present, because there was nothing on the face of the deed to shew that any debt due from *Slade* to any other creditors, by virtue of any bill of exchange, was to be extinguished. But there is a recital shewing, manifestly, that it was intended that debts due from *Ellis*, in respect of bills of exchange, to the creditors who signed the deed should be released. Secondly, the plaintiff's letter of the 17th March does not operate as a waiver of any other advantage which they would be entitled to derive by virtue of the deed. That letter relates only to the security which *Kensington* and Co. had upon the premises at *Bankside*; but *Kensington* and Co. could not be deprived of that security, for the deed operated only upon the bills of exchange.

Parke contra. The plaintiffs are not entitled to recover: for, first, the deed does not affect their remedy upon the securities in their hands; and, secondly, if it otherwise would have done so, that effect is precluded by the letter which was given at the same time. At

(a) 3 Burt's B. C. 560.

the time when *Kensington and Co.* executed the deed, *Ellis* was indebted to them for a cash balance, and also on bills of exchange accepted by them for 18,200*l.* To secure both those debts, they had securities in their hands, viz: a conveyance of the estate at *Bankside*, *Lewis's* bill, and *Glade's* bills. By executing the deed, and giving up the bills accepted by *Ellis* to the trustees, *Kensington and Co.* have relinquished all future remedy upon *Ellis's* bills, or against his estate, but not the benefit of those securities upon *Ellis's* property which they already had. They delivered up the bills for the special purpose only of discharging the estate of *Easterly, Hall and Co.* That was clearly the principal object of the deed, and *Kensington and Co.* executed the deed as creditors of *Easterly, Hall, and Co.* The deed at most can operate only to discharge the direct remedy upon the bills, but leaves the remedy upon all other then existing securities in the hands of *Kensington and Co.* in full force. *Kensington and Co.* may, therefore, retain any money coming to them either from the premises at *Bankside* or from *Lewis's* bill, in satisfaction of the debt due to them from *Ellis*, as the acceptor of the other bills. That the principal object of the deed was to discharge the estate of *Easterly, Hall, and Co.* appears manifest from the whole of the deed taken together. It is true that there is a recital that the provisions proposed to be made should be accepted by the creditors of the said copartnership in full satisfaction of their respective debts, as well against *Easterly, Hall, and Co.* as against the *Fullers*, or against the estate of *J. Ellis*, or against *Atkinson and Mount* respectively, in respect of the said bills of exchange drawn, accepted, or indorsed by them or any of them respectively, and then

1800.

 Matter
against
CARRIERS

1821:

MAYOR
COMMONS
CHANCERY

remaining over due, with the names of Easterby, Hall and Co. thereon. This recital shews an intention only that the provisions should be accepted by the creditors of the copartnership in satisfaction of their debts, inter alia, against the estate of *Ellis*, but the members of *Bankside* and *Lewis's* bill were not, and the purpose of this deed, the estate of *Ellis*; they were part of the estate of *Kensington and Co.* to the extent of their lien. This recital, therefore, does not show that there was any intention of releasing that property. Besides, the deed does not contain any release of *Ellis's* estate. It expressly releases *Easterby, Hall, and Co.* and the two *Pullers* (but not *Ellis*) from all debts due to them, the creditors, from the copartnership of *Easterby, Hall, and Co.* the continuing partners, or the two *Suttons* late partners. The creditors of *Easterby, Hall, and Co.* release jointly and severally the two *Pullers* but not the estate of *Ellis* from all judgments, bills of exchange, promissory notes, and other securities made for securing the payment of the said several debts on any of them, which they the said several creditors were or might be entitled to against the said firm or copartnership of *Easterby, Hall, and Co.* or against the two *Pullers*, or either of them, by reason of the said several debts relating to the copartnership or the concerns thereof antecedently to the date of the deed. The release does not extend to any debt due by *Ellis* to any of the creditors who execute the deed; but it extends to all debts due from *Easterby, Hall, and Co.* or from the *Pullers* to any of the creditors; and then, by another clause, the creditors agree "to give and deliver up into the hands of the trustees all such bills of exchange drawn, accepted, or indorsed by

by the said firm or copartnership of *Easterby, Hall, and Co.*, or by the *Putters*, or by *J. Ellis*, or by *Atkinson and Brown*, and all such other bills of exchange as they the several respective creditors, parties thereto, now hold for the several debts due and owing to them, respectively from the said copartnership of *Easterby, Hall, and Co.*, on any part of such debts respectively." The creditors therefore agree to deliver up the bills of exchange before described, and thereby give up all remedy upon those bills, but they do not agree to give up the means of satisfaction for these bills, which they already have in their hands. In effect, the bills so delivered up may be considered as partially paid, by the securities placed in their hands for the purpose of paying them; and the creditors do not mean to refund that partial payment. Lord *Ellenborough* in *Ex parte Carstairs* (a), was of opinion, that the creditors did not mean by this deed to give up, and that they had not thereby given up their remedy on the bills of exchange accepted by *Slade*, and he decided that they could prove under his commission, and his decision goes the length of deciding this case, for *Slade's* bills, *Lewis's* bill, and the estate at *Bankside*, are all securities for the same debt, viz. the debt owing to *Kensington and Co.* by *Ellis*, as the acceptor of his bills; and if, notwithstanding the deed, *Kensington and Co.* might prove against *Slade's* estate and thereby receive the proceeds of *Slade's* bills, they may also retain the proceeds of the other securities, *Lewis's* bill, and the mortgaged estate. But, secondly, this latter at all events prevents the deed having the effect contended for, for it could not apply to any claim, except the debt due from *Ellis* on the bills, for none other could possibly be

1828!

Master
against
Carstairs

(a) 1 Burr. 2. 656.

1838.

Messrs.
Kensington
against
Elliott.

prejudiced by the deed, and it is wholly collateral to the deed. It operates as a declaration, that, as between *Kensington* and Co. and *Elliott's* assignees, all the securities in the hands of the former should be pledged to them for the payment of *Elliott's* bills.

Lord TENTERDEN C. J. now delivered the judgment of the Court, and said, that the deed executed by the bankrupt *Elliott*, at *Bankside*, in the year 1834, was intended to give effect to the declaration made by the deed of assignment, and that the Court was bound to give effect to it.

The plaintiffs' claim to recover in this action is founded upon the supposed effect of the deed executed for payment of the debts of *Easterby, Hall, and Co.* It appears that Messrs. *Kensington* refused to execute that deed until they received from the plaintiffs a written assurance, that by so doing they should not prejudice their security on the premises, lately belonging to the bankrupt *Elliott*, at *Bankside*. The greater part of the money now claimed by the plaintiffs was the produce of that security. It was contended, on their part, that this assurance was intended only to relate to the claim on those premises, as security for the cash-balance due to Messrs. *Kensington* from *Elliott*. But we think it is impossible to understand it in this narrow view, because the deed has not the smallest connection with, or relation to, that balance. If, therefore, the execution of this deed shall have the effect for which the plaintiffs now contend, Messrs. *Kensington* and the defendants, who represent them, will have great reason to complain that they have been deluded. Still, if this be the legal operation of the deed, we, in a court of law, are bound to give that effect to it. We are of opinion, however, that the deed has not that effect. It is material to consider what the situation of Messrs. *Kensington* on the

one hand; and of the plaintiff on the other, was before the execution of that deed. Now Messrs. *Kestington* were the holders of bills of exchange to an amount exceeding 18,000*l.* drawn by *Batterby* and *Hall* upon and accepted by *Ellis*, and which had been deposited with them by *Atkinson* and *Mount* as security for money advanced. They had, therefore, a right to prove those bills against the estate of *Ellis*, under the commission. They were also the legal proprietors of the premises at *Bankside*, which had been conveyed to them by *Ellis* with a power of sale, and the holders of certain bills of exchange accepted by *Slade*, and of a bill accepted by *Lewis*; and the *Bankside* premises had been conveyed, and these bills of exchange deposited, by *Ellis*, as security not only for the cash-balance that might be due from *Ellis*, but also for the payment of any bills of exchange bearing his name, of which they might by any other means become the holders. The bills to the amount of 18,000*l.* were of this description; and in making their proof on these bills they must have mentioned the *Bankside* premises, and the bills of *Slade* and of *Lewis*, as securities in their hands. It does not appear of what precise value these securities ultimately became; but it appears that *Slade*, as well as *Lewis*, had become bankrupt; and if the value of the whole, beyond the amount of *Ellis*'s cash-balance, be taken at 5000*l.* or 6000*l.*, it will, probably, be not under-rated; and this would leave their proof good, in the narrowest and strictest view, for 18,000*l.* or 19,000*l.*

It must, therefore, have been desirable, by those who had the management of *Ellis*'s affairs, and an interest in his funds, to relieve his estate from the proof on these bills; and this sufficiently accounts for the desire mani-

1828.

Masters
against
Cavaliers.

1828.

MALLET
 v.
 CARSTAIRS.

testified by the plaintiffs, that Messrs. *Kensington* should execute the deed in question. By executing it they consented to give up, and did in fact give up, the bills, to the amount of 18,200*l*.

The estate was thereby absolutely relieved from that proof, and Messrs. *Kensington* took the chance of the produce of the estate of *Easterby* and *Hall* under the deed, in the place of their right to a dividend under *Ellis*'s commission. The bills, to the amount of 18,200*l*., had been accepted by *Ellis*, for the accommodation of *Easterby* and *Hall*. There were various and complicated dealings between those parties; and when the deed was made, it was unknown in whose favour the balance would ultimately be found to be. The deed contains a provision for paying to the assignees of *Ellis* a dividend out of the first portion of the fund, on the money then actually received by Messrs. *Kensington*, and other persons there named, out of the estate of *Ellis*; and a provision for paying out of the secondary or collateral fund of 186,000*l*. the balance that might ultimately be found due to *Ellis*'s estate.

The deed itself is of very unusual length, and very multifarious and complicated. There is an abstract of it sufficient for the purpose of this cause in Mr. *Buck*'s report of the case, *Ex parte Carstairs*; before my Lord *Eldon*; and I do not think it necessary to repeat the detail of its provisions. It is clear, that the great and primary object was, the payment of the debts of *Easterby* and *Hall*, and the relieving of them from the pressure of their creditors. It is not clear that any instrument which did not furnish a direct charge against them was contemplated. There were many bills of exchange outstanding, which did furnish such a charge against them,
 and

and also against some other persons, the two Messrs. *Puller*, for instance, who had put their name to bills which had been sent abroad for the debts, or on the account, of *Easterby and Hall*. These two gentlemen were to take a part in the whole arrangement, both of the sale and purchase of the mines; and accordingly their names are mentioned in the clause of release, by the creditors of *Easterby and Hall*, though neither *Atkinson* and *Mount* nor the estate of *Ellis* are mentioned in that clause: they are mentioned in some of the recitals, but not in this clause. And, as was said by Lord *Eldon*, with whose judgment we entirely agree, it will not be found, on an attentive perusal of the deed, that any bills of exchange are intended to be given up, except those which constituted debts due and owing by *Easterby and Hall* (of which description were the bills for 18,200*l.*). Nothing is said as to any bills of the description of those accepted by *Slade and Lewis*. There is nothing expressed to prevent the holders of such bills from availing themselves of them, although, by so doing, a remote and circuitous charge might eventually arise against *Easterby and Hall*. *Slade's* bills were the subject of the case before Lord *Eldon*: they are not distinguishable from *Lewis's* bill mentioned in the present case, and his Lordship's judgment is, therefore, a direct authority in favour of the defendants as to that part of the plaintiffs' claim; in principle, also, it is an authority in their favour on the other part of the claim: for if the collateral security of a bill of exchange was not lost by the operation of the deed, and the giving up other bills, for the payment of which it was a security, neither could the security of real property be lost by the operation of the deed:

there

1828.

MALTBY
UPP
CARRUTHERS

1898.

MALTRY
against
CARSTAIRS.

there can be no difference in principle between the one and the other. It may not unreasonably be supposed that many of the creditors of *Easterby* and *Hall* would be willing to give up bills of exchange, and to release them, if they were allowed to retain the benefit of their collateral securities; who would have refused to do so if they had not been allowed to retain that benefit; and any attempt to deal with such securities would probably have been found impracticable, and would have defeated the whole scheme of arrangement, which the parties were probably sanguine enough to think likely to provide a fund sufficient in the end to meet all demands, present and contingent; and the assignees of *THE* may be well supposed to have been content with the chance of re-imbursement of such sum as Messrs. *Kensington* might obtain by reason of their collateral securities; out of the secondary fund, on the final settlement of accounts between them and *Easterby* and *Hall*, and to have preferred an arrangement which left in the hands of Messrs. *Kensington* the collateral securities only, to the then existing state of things, which gave Messrs. *Kensington* not only these collateral securities, but also the right of proof and dividend on a further sum of many thousand pounds.

For these reasons, our judgment is in favour of the defendants, and a nonsuit is to be entered.

Judgment for defendant.

1822.

Gohorne and Others against Feun.

A RULE had been obtained in this Court for a prohibition in a suit instituted in the consistory court of the Bishop of London, by the defendant *Feun*, a parishioner of *St. Martin's in the Fields*, to compel the plaintiffs and others, as churchwardens of that parish, to produce the accounts of their receipts and disbursements. They pleaded in the Ecclesiastical Court that their accounts had been duly allowed by a select vestry, which had existed in the parish from time immemorial; the defendant *Feun* denied that any such select vestry existed by law. Upon shewing cause against the rule for a prohibition, the parties agreed to try the question between them on a feigned issue: the issue was, Whether there was and from time immemorial had been, a vestry of the said parish, composed of select persons, parishioners of the said parish, for the time being, or not? There were two other issues, as to a custom for the churchwardens to have their accounts audited by the select vestry, which it is unnecessary to notice more fully, as it was not disputed that if the plaintiffs were entitled to a verdict on the first issue, they were entitled to it on the second and third issues also. Plea, the general issue. At the trial

A custom that there shall be a select vestry of an indefinite number of persons, continued by election of new members made by itself, and not by the parishioners, is valid in law.

Semble, that it must be part of such custom that there should always be a reasonable number, and that the reasonableness of the number must be decided with reference to long-established usage, and to the population of the parish; such a custom having existed from time immemorial in a parish.

In the year 1662, by a faculty granted by the Bishop of London, forty-nine persons, together with the vicar

and churchwardens, were named as the select vestry; and that number was to be kept up by elections, to be made by ten at least of those forty-nine, together with the vicar and churchwardens. In the year 1673 this number of ten was, by another faculty, reduced to seven; and these faculties were acted upon ever afterwards. Ten out of the fourteen vestrymen, exclusive of the vicar and churchwardens, who were present at the vestry holden next before the promulgation of the first faculty, were part of the forty-nine named in that faculty: Held, that as the vestry appointed by the faculty, and since continued, was not inconsistent with the vestry previously existing by the custom, the custom was not destroyed by the parish having accepted the faculty, and acted upon it ever since, the faculty not being binding in law, and the vestry having power at any time to depart from its directions.

before

1899.

GOVING
against
FARM.

before Lord Tenterden C. J., at the *Middlesex* sittings after *Easter* term, 1827, the following evidence was given :

A charter of feoffment of the year 1225, by which *William*, the tailor of the parish of *St. Martin* of *Charing*, confirmed certain lands in that parish, &c. &c. levied in the 35th year of *Henry* the Third, of property, described to be in the parish of *St. Martin* in the *Fields*. An extract from the ecclesiastical taxation of Pope *Nicholas*, 12 *Edw.* 1. in the year 1291, relating to part of the temporalities of the abbot of *Westminster*, described to be in the parish of *St. Martin in the Fields*. An assize of novel disseisin, in the year 1809, (3 *Edw.* 2.) brought in the Court of Common Pleas by *John de Hyde* v. *William Brown*, for common of pasture in the parish of *St. Martin in the Fields*, as belonging to his freehold in the same parish. In 1339, (14 *Edw.* 8.) an account preserved in the exchequer of certain rolls of certain payments for the ninth sheaf, fleece, and lamb, in the parish of *St. Martin in the Fields*. A deed of confirmation in 1367, (42 *Edw.* 3.) from *Henry de Bello Monte*, knight, to King *Edward* the Third, of a place and garden, and appurtenances, near to the cross of *Charing*, in the parish of *St. Martin in the Fields*. The defendant, as to this part of the case, relied upon letters patent of the 4 *Jac.* 1., which recited that the inhabitants of *St. Martin in the Fields* had made their humble application unto his Majesty, stating, "that whereas, in the time of King *Henry* the Eighth, the said inhabitants had no parish church, but did resort to the parish church of *St. Margaret* in *Westminster*, and were thereby forced to bring their bodies by the court-gate of *Whitehall* which the said *Henry* then

misliking,

and being annexed to the church in the parish of St. Martin in the Fields to be erected, and made a parish there, which now is so greatly inhabited, as the church is not of sufficient bigness to receive the parishioners, and the church-yard so little, as there's no room to bury their dead." &c. &c.

1828.

Conclusive
against
Farr.

Many entries in the parish books, from 1574 to 1662, were then read to prove the existence of the select vestry. These entries appeared to have been signed by persons described generally as "the masters of the parish." In some instances, however, they were described as "parishioners." It appeared from these entries, that the business transacted was done by a very small number of persons then present. Before the year 1600, it did not appear in what manner these persons were chosen; but after that period, it appeared that the existing body called upon others to become constituent members of their own body. Before the year 1662, the number of persons varied: they never amounted to forty-nine, and at one time were less than twenty. In the year 1662, a faculty was granted by the Bishop of London for a select vestry, to consist of forty-nine persons besides the vicar and churchwardens, and authorising ten besides the vicar and churchwardens to act. At the vestry holden next before this faculty was granted, fourteen vestrymen were present, and ten of them were included in the forty-nine appointed by the faculty. A second faculty was granted in 1675, enabling the vicar and churchwardens, and seven others, to act. From 1662, the select vestry had always consisted of forty-nine besides the vicar and churchwardens. The plaintiffs then gave in evidence copies of the following records: first, a copy of a judgment

in

1823.

GOLDING
against
Fry.

in *Trinity term, 1741*, (5 G. 2.) between *W. Kendal* and *Sir H. Perreux*, which was an action for a false return to a mandamus, commanding *Sir H. Perreux*, the then archdeacon of *Middlesex*, to swear in *Tindal* and *Kendal* as churchwardens, they having been chosen by the parishioners. He returned that he had sworn in *Tindal* and *Wood*, as the churchwardens, they having been elected by the vestry, and upon that the action was brought for a false return. There was a verdict for the Defendant. Secondly, a copy of a judgment in 1741, *nam*, signed issue between *Berry* and *Tindal*, which appeared by the record to have been tried at bar: the issue was, whether there then was, and from time whereof to be taken had been, a vestry of the said parish, composed of a certain select number of persons, parishioners of the said parish for the time being, and there was a verdict in favour of the affirmative of the issue. Thirdly, a copy of a judgment in prohibition in a case of *Berry v. Berry* (a), where the issue raised upon the pleadings was, Whether the churchwarden ought to be elected by a select vestry or by the parishioners, and there was a verdict establishing the election by the select vestry. The plaintiff then relied upon several acts of parliament, in which the select vestry of the parish of *St. Martin in the Fields* was recognised as an existing body: One of them passed in the 1. Jan. 2. entitled, "An act for erecting a new parish to be called the parish of *St. James*, within the liberty of *Westminster*," enacted, "that the vestrymen or any six or more of them should exercise the like power and authority for regulating the affairs of the parish of *St. James* as the vestrymen of the said parish of *St. Martin* have and exercise in reference

(a) *Hilary term, 24 G. 2. Fent, N. P. C. 156.*

to that parish." Another passed in the 10th June, entitled, "an act for enlarging the time given to the commissioners for building fifty new churches," &c. authorised the commissioners to make a convenient number of sufficient inhabitants in each such new parish respectively to be vestrymen of such new parish, who shall exercise the same powers and authorities for regulating the affairs of such new parish as the vestrymen of the present parish out of which such new parish or the greater part thereof shall be taken now have or exercise; and if there be no select vestry in such present parish, then as the vestrymen of the parish of St. Martin in the Fields, within the liberty of the city of Westminster, in the county of Middlesex, now have or exercise."

Lord Tenterden C. J. left it to the jury to try, upon the evidence, first, whether the parish had existed from time immemorial, and if they thought it had, then they were to consider next, whether the select vestry had existed from time immemorial. If they thought there had been such select vestry from time immemorial; they must find for the plaintiff, otherwise for the defendant. The jury having found a verdict for the plaintiff, Sir James Scarlett, in Trinity term 1827, obtained a rule nisi for a new trial, or for a constitution, notwithstanding the verdict, on the ground that the custom stated on the record, and proved at the trial, was bad for uncertainty, inasmuch as it did not define the precise number of which the select vestry was to consist; and he cited *Doe v. Carter* (a) and *Broadbent v. Paine* (b), to show that the custom was void for uncertainty. And, secondly, asserting that the custom

1828.

Colledge
against
Paine.

(a) 2 An. 1145.

(b) 3 An. 200.

1828.

Golding
against
Foss.

was good, still it was clear, from the evidence, that it had not existed from time immemorial, because the faculty which had been obtained in 1662, and acted upon by the parishioners ever since, operated as an abandonment of the custom.

The *Solicitor-General, Taunton, Gurney, and Barnwall* now shewed cause. The custom or prescription set out on the record, and proved at the trial, is not invalid in law on the ground that the precise number of which the select vestry is to consist is not defined by it. There is little to be found in the books on this subject. A select vestry is a body (distinct from the parishioners at large) to whom the conduct of the parish affairs is committed by the parishioners. It is not essential, therefore, to such a body that it should always consist of any precise definite number. The objection assumes that it is a rule of universal application that the number of the select vestry must be certain. If any case, therefore, can be stated in which a custom or prescription for a select vestry consisting from time to time of an uncertain number would be good, it will shew that the rule insisted upon cannot prevail. Now, suppose a custom that all the parishioners who pay a certain annual rent should compose a select vestry. The precise number of the vestry would then vary from time to time; but as such a custom would mark the distinction between those who are and those who are not admissible to the vestry, and would throw the administration of the affairs of the parish into the hands of persons who would be most likely to administer them faithfully and impartially, it would clearly, therefore, be a good custom or prescription; and if so, then the rule insisted upon cannot prevail.

1826.

Gordon
against
Farr.

prevail universally. The societies of the Inns of Court furnish an instance of a select body uncertain in number, which has existed from the earliest times. The conduct of the affairs of those societies is committed to certain persons who are called masters of the bench (as the members of this select vestry in ancient times were called masters of the parish). They consist of no definite number, and they have a power of electing others. There can be no doubt that the benchers of these societies are a legal body, and they bear a very strong analogy to a select vestry. So where by charter the mayor of a town corporate is elected from the burgesses, and the person who has filled the office of mayor is to fall back, and become a common-councilman, the numbers of the common-council would vary in some degree from time to time. But it is more reasonable that the number of persons who are to compose a select vestry, which has existed from time immemorial, should vary with the population of the parish, rather than that it should be fixed; for the number of persons reasonably required in the time of Richard the First to manage the affairs of the parish of *St. Martin in the Fields*, when the population was probably very small, would be very ill fitted to conduct those affairs when the population, and the consequent duties to be performed by the vestrymen, have so greatly increased. It is not disputed that the number of the select vestry must be reasonable with reference to the population of the parish, the duties to be performed, and the importance of the trusts committed to the care of the vestrymen; but there is no ground for saying in this case that the number of forty-nine is unreasonable. There are many authorities to shew that

1836.

Goulding
against
Rex.

a custom is void for uncertainty; but in such cases the uncertainty has made the custom unreasonable. In this case it is more reasonable that the number of the select vestry should be uncertain than fixed. Those cases, therefore, do not apply. In the case of *Dent v. Coates* (a) the custom stated was that, whenever twenty-four parishioners, or the major part of them, met, and appointed how much should be raised throughout the whole parish, a certain proportion thereof had been used to be raised by the hamlet of *Romanby* by their separate churchwarden, and paid over to the rect. That custom was unreasonable upon two grounds: first, because any twenty-four parishioners, not constituting a select body, might tax the whole parish; and, secondly, because as a proportion of the burdens laid upon the whole parish were to be borne by a particular township, reason and justice required that that proportion should be defined. In *Viner's Abridgment*, tit. *Custom*, the case of *Tanistry* (b) is cited to show that such custom shall be void for want of certainty, which in case of such grant would be void for want of certainty; but the editor adds, quære, this, for there may be a custom which may not begin by grant. The present case furnishes an instance of such a custom, for a select vestry must, in the first instance, have derived its origin, not from any grant to the members of it, but from a delegation of authority by the body of the parishioners to the members of such vestry to manage the affairs of the parish. *Gibson's Codex*, 246. cited in *Burn's Ec. Law*, vol. ix. p. 10. *Batt v. Watkinson* (c), is an authority to show that a select vestry may exist by pre-

(a) 2 Str. 1145.

(b) Sir John Davis's Reports, 34.

(c) Lutw. 1027.

scription; and where a select vestry has been proved (as it has in this case) to have existed from very early times, every presumption ought to be made in favour of its legal commencement. It may, therefore, be presumed that the parishioners, in the first instance, delegated to the members of the first select vestry the power, not only of managing the affairs of the parish, but of increasing or diminishing their own numbers at their discretion, according to the nature and quantity of the duties which they might have to perform, with this qualification, that the members should always be parishioners, and, consequently as such, that they should always have an interest that the affairs of the parish should be properly conducted, and as vestrymen, that the number should be adequate to the duties cast upon them from time to time. It may be presumed (if necessary) in favour of such long-continued usage, that the power delegated to them was subject to this limitation, that the number of vestrymen should never exceed the greatest number, nor be less than the smallest number which, by the entries in the books, appeared to have composed the vestry at different times. The case of *Corporations* (a) affords a very remarkable instance of such a presumption having been made. The charters of certain corporations prescribed that the election of mayors should be by the commonalty or burgesses; but the ancient and usual mode of election had been by a select body, and it was decided that such election was good in law; and it was there laid down that as the corporation had the power of making laws for the better government of their body, it might be presumed that they had, in the first instance,

1828.

Gordon
against
Park.

(a) 4 Rep. 77 b.

1828.

SPRING
against
FENN.

made an ordinance sanctioning the ancient mode of election, such reverend respect (Lord Coke adds) "the law attributes to ancient and continual allowance, though it begin within the time of legal memory." An act of parliament may even be presumed in favour of such an ancient and long-continued usage, *Purwar's case*, cited in *Lady Stafford v. Llewellyn* (a), *Mayor of Hull v. Horner* (b), *Pickering v. Lord Stamford* (c), *Chatmer v. Bradley* (d). It is true that the issue upon the record supposes a prescriptive right, and would not be supported by proof of a select vestry founded on an act of parliament. But if such an act of parliament ought to be presumed, a new trial ought not to be granted.

Secondly, the acceptance of the faculty in 1662 by the then vestry, does not operate as an abandonment of the antecedent right, because the members of the then vestry had no authority to annihilate all the rights of the parish by accepting a new constitution. If once, in point of law, the government of the parish was vested in a select vestry, it is as much the right of the parishioners to be governed by such a vestry as in ordinary cases it is that it should be governed by the parishioners at large. The acceptance by a corporate body of a new charter, varying in some particulars from those by which the corporation had been previously governed, does not necessarily abrogate all antecedent rights, and the acceptance of a void charter clearly would not abrogate those rights. So the acceptance of a void lease does not work a surrender by operation of law of a prior valid lease, *Roe d. Berkeley v. The Archbishop of York* (e).

(a) *Skinner*, 78.(b) *Cowper*, 102.(c) 2 *Yes.* jun. 272.(d) 1 *Jac.* 47, 51.(e) 6 *East*, 86.

But

But the object of the faculty was not to destroy the select vestry, but to purify it. In the case of *Berry v. Banner* (a) the jury found for the plaintiff, and there Lord *Kerzon* said, that the faculty *proprio vigore* was a dead letter, though it was evidence of the antecedent right. Besides, there are various acts of parliament, which recognise the select vestry of *St. Martin in the Fields* as a lawful body, and the statute of *Anne* for building the fifty new churches recognises it as existing at that time, and it then consisted of forty-nine members.

1828.

GOLDING
against
FARR.

Scarlett, Brougham, and Joshua Evans contra. A custom that a select vestry, the members of which are selected from time to time by the parishioners, shall always consist of an indefinite number, may be good. But a custom that an uncertain and indefinite body shall elect each other, and be the sole judges of what number their own body shall consist, is an unreasonable custom, and, therefore, void. It is possible that their number may be reduced to one or two persons, and it surely would be unreasonable that the affairs of a populous parish should be administered by one or two persons, *Com. Dig. tit. Prescription and Custom. Broadbent v. Wills* (b), and the case of *Tanistry* (c), shew that a prescription or custom must be both reasonable and certain. In *Batts v. Watkinson* (d), the select vestry consisted of a definite number, twenty-four. It may not be necessary that the precise number of which the vestry is to consist at all times should be defined by the custom; but to make such a custom reasonable, it should, at all events, fix a minimum. An act of

(a) *Peake's N. P. C.* 156.(c) *Davis's Reports*, 32.(b) *Wills*, 360.(d) *Lutw.* 1097.

Here the ~~existence~~ of the select vestry depends on custom or prescription. But of the very essence of such custom or prescription that the usage should be continued down to the very time when it is relied upon.

The prescription stated upon this record assumes that from the time of *Rial and the*. First there always has existed in the parish of *St. Martin in the Fields* a select vestry, consisting of an indefinite and uncertain number.

A select vestry, therefore, constituted in any other manner, is not consistent with that custom or prescription.

Now it was in evidence, that before 1662 the vestry did not consist of the number of forty-nine. From that period it has consisted of that number, which was specified in the faculty. The custom, therefore, has been departed from and discontinued, and, consequently, the prescription is broken.

and it is not to be taken into consideration in this case. *Cur. adv. vult.* and ordered that the parties should go on with the case.

Lord Mansfield G.C. now delivered the judgment of the Court. This case was before the Court on a motion for a new trial of certain issues directed by the Court. The principal issue (the others being in fact dependent upon this) was, Whether in the parish of *St. Martin in the Fields* there has been from time immemorial an assembly composed of select persons, parishioners and inhabitants of that parish for the time being or not?

The case was tried before me; the jury found the affirmative. Considering this as a question whether this parish had a select vestry, or whether the inhabitants generally have met in vestry, and to the third verdict finding a select vestry.

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1818.

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1828.

Guaranty
against
Knox.

trial in an action for a false return to a mandamus, at which, according to all probability, the same question had been tried, and the same verdict found, although the form of the record is not such as to shew this with entire certainty. The second was in the year 1792, in a proceeding in prohibition, in which questions of law might have been raised and put on the record to be taken to the highest tribunal of the country. There are also acts of parliament relating to this parish, referring matters to the authority of the select vestry, and, consequently, recognizing the existence of such a vestry; and there was a statute in the reign of Queen Anne relating to the new churches built at that time, appointing the vestry of this parish of *St. Martin's*, as it then existed in practice, as a model to be followed by such of the new parishes as had not select vestries otherwise constituted. It was said, however, and said truly, that the select vestry of this parish, as it existed at the date of those acts of parliament, is not precisely that vestry which may exist according to the custom found at the present trial. And a similar remark was made as to the two former trials; whether correctly as applicable to the first of them only may be doubted; as applicable to the opinion given by Lord *Knox* at the trial in 1792, on the form of the issue as then presented, and to the evidence and verdict as conformable to that opinion, the remark is undoubtedly just. At the trial before Lord *Knox*, the form of the issue was treated as a question on a vestry composed of some definite number of persons, whereas the present record raises no such question, and the jury were so informed by me at the trial, and the verdict must be considered as establishing a select vestry not necessarily composed of any definite number

number of persons. And this has given rise to the objections on which the motion for a new trial was founded. The objections were two; first, that a custom for a select vestry of an indefinite number of persons, continued by election of new members made by itself, and not by the parish at large, was void in law. And, secondly, that the custom in this parish appeared by the evidence to have been discontinued and abandoned, and therefore lost and gone. It is obvious that the first objection does not properly belong to a new trial; but as the issues in this case were directed by the Court, with a view to a proceeding pending in the Court, it properly belongs to that view of the case; and, therefore, the manner of bringing it forward and discussing it is not material. In support of the first objection, it was very strenuously urged, that unless a number be fixed by the custom, below which the vestry must not fall, a vestry filling up its numbers at its own choice may allow itself to be reduced to two or three only, exclusive of the vicar and churchwardens, and thereby the whole government of the parish, as far as relates to the church and its management, and the churchwardens' accounts and other matters of that kind, may fall into the hands of a number of persons much too small to secure reasonable and proper management, and due attention to the interest of the inhabitants of the parish.

It was also objected, that if the number be not limited, the vestry may consist of too many persons, even of the whole parish. This point, however, was little urged, and there is obviously no weight in it; the great complaint against select vestries being, that they consist not of too many persons, but of too few: and if a maximum had been fixed by custom in the very remote times to which

1828.

*Objections
against
Parish.*

1828.

General
opinion
Rural.

which custom must go back, the number that might have been proper in those times might, and probably would, be too small for the great increase of population that has gradually taken place. We are also of opinion, that a custom of this kind is not void in law for want of a minimum. But although we are of this opinion, as a matter of law, I would by no means have it understood that we think the evidence or the verdict in the present cause establishes the fact, that there may not be a minimum in this parish. It will be quite consistent with the verdict, and not inconsistent with the evidence, that the number should never be less than the lowest that can be found in any of the lists, and this I believe will, in no list, be found so few as twelve. The force of the issue raised no question of this kind. Now, although no numerical minimum be fixed by the custom, it by no means follows as a consequence, that the number may be reduced to two or three, as the objection supposes; the law may consider it as part of such a custom as the present; that there shall be a reasonable number. I am aware that this may lead to questions what shall be a reasonable number. Such a question, if raised, would be to be decided with reference to long-established usage and to the population of the parish. That number, which might not be too small and not unreasonable three or four centuries ago, in a parish in which there might not be more than a dozen substantial householders or even fewer, might not be reasonable on a change of circumstances; when, by covering fields with houses, the number might be increased more than a hundred fold. And whatever may be thought of the degree of influence, that the laws of power exercise on human conduct, I believe the love of ease does not exercise less, and

as an instance is known in practice, in which two or three persons have gratuitously taken upon themselves the whole burthen of administering such of the affairs of a populous parish as belong to a vestry. I do not think there is any reason to provide in theory against such an occurrence, by requiring a definite minimum as essential to the validity of a custom. The question in this case, as in many others, turns upon the balance of convenience. We think it more convenient that a custom of this nature should leave the number undefined, capable of being regulated by reason, and varying with the changes that time produces, than that there should be any fixed point, from or below which no change of circumstances should allow a departure. We therefore think the custom good in law.

1826.

Before
appears
here:

The second objection, viz. that the custom in this parish appeared by the evidence to be discontinued and abandoned, and therefore lost and gone, is a question properly suited to the nation for a new trial. It appears, by the evidence, that in the year 1662 a faculty was obtained from the Bishop of London, naming forty-nine persons, together with the vicar and churchwardens, as the select vestry, and appointing that number in future to be kept up by election, to be made by ten at least, together with the vicar and churchwardens. In the year 1678, this number of ten was by another faculty reduced to seven. These faculties have since been constantly acted upon, have been considered as governing the parish, and treated as a legal foundation of the practice that then prevailed. It is clear that these faculties have no validity in law. As to the constitution of the first vestry thereby appointed, it appears that ten out of the fourteen vestrymen, exclusive of the vicar and churchwardens,

1881.

Quinn
against
Dunn

wardens, who were present at the vestry held immediately before the promulgation of the first faculty, are part of the forty-nine named in that faculty. Now, if the vestry, as appointed by the faculty, and as it has since continued, were inconsistent with the vestry previously existing by the custom, there would be more weight in this objection than can at present be given to it. It is not inconsistent with a custom fixing no definite number, that, for a certain period, the vestry should be considered as consisting of a definite number. If there may be any reasonable number, forty-nine may be thought to be that number, and may be considered as the proper number. Suppose a vestry, consisting of twelve or eighteen persons, should have come to a resolution to increase their number to forty-nine, and should do so, and recommend that number to be kept up in future, and that this resolution and recommendation should be followed in practice for a century and a half, nothing inconsistent with the antecedent usage would in fact be done. The resolution would have no binding force; it might be departed from, and a greater or less number chosen, if the existing body should think fit. And the case would be the same, even if it should appear, that during that time the vestry and the parishioners had thought the resolution binding upon them, and had acted under that opinion. And this is precisely the case of these faculties, and of the opinion and usage that have since prevailed. I have already observed, that ten members of the old vestry became members of the new, and, therefore, the old vestry, or at least a majority thereof, may be considered as having acquiesced in the new. And it is as competent to the vestry to increase or diminish their number, as if no faculty

family had ever existed. And as the practice is not inconsistent with the custom, we are of opinion, that the custom has not been destroyed, but still remains as the law of the parish. The rule for a new trial must, therefore, be discharged.

1828.

Gates
against
Hunt

Rule discharged.

Howell against Wilkins.

Tuesday,
February 12th.

IN this case the affidavit to hold to bail appeared by the jurat to have been sworn at the King's Bench Office, Inner Temple, London, the 7th February 1828, before Thomas Chambre. A rule nisi had been obtained by Beaden for discharging the defendant out of the custody of the sheriff on filing common bail, on the ground that it did not appear that the affidavit of debt was sworn before any person who had authority to take affidavits, and he cited *Malling v. Poland* (a), to shew that an affidavit of debt not entitled in any court, and only with the words "by the court" written at the bottom of the jurat, was not sufficient.

An affidavit to hold to bail, purporting to be sworn "at the King's Bench Office, Inner Temple, before T. C.," was held to be sufficient.

Sir James Scarlett and Pollett now shewed cause, and contended that it was sufficient if there was any thing on the face of the affidavit to shew that it was sworn before an officer who had power to take affidavits. Now it appeared by the jurat, that it had been sworn at the King's Bench Office, London, and it must be in

(a) 3 M. & W. 167.

ended

1828.

Howell
against
Wilkins.

tended that *Thomas Chambre*, who certified that fact, was a person attending there and duly authorised to take affidavits. In *Kennett and Avon Canal Company v. Jones (a)*, it was held to be no objection to an affidavit to hold to bail, that it appeared to have been taken before *A. B.*, a commissioner, &c. without adding "of the court of B. R.;" and in *Bland v. Drake (b)*, an affidavit not entitled in the court, but purporting at the foot to have been sworn before *J. Y.*, deputy filacer, was held to be sufficient.

Reader, contra, on the authority of the case, which contended that it did not appear by the affidavit that *Thomas Chambre* was an officer of this Court.

Lord Tenterden C.J. This affidavit appears to have been sworn in the King's Bench Office, before *Thomas Chambre*. I think it must be understood, and we are bound to take notice, that *Thomas Chambre* was an officer of this Court, attending at the King's Bench Office, and authorised to take affidavits.

Rule discharged.

(a) 7 T. R. 451.

(b) 1 Chitty's Rep. 165.

1828.

**The KING against The Inhabitants of the Parish
of ALL SAINTS in the Town and County of
the Town of SOUTHAMPTON. (a)**

UPON an appeal against an order of two of the justices of the peace for the county of *Hants*, whereby *Elizabeth Carden* was removed from the parish of *Romsey Extra*, in the said county of *Hants*, to the parish of *All Saints*, in the town and county of the town of *Southampton*, the sessions confirmed the order, subject to the opinion of this Court on the following case:

Elizabeth Carden was the widow of one *Richard Roe Carden* deceased, and in order to prove the settlement of the said *Richard Roe Carden* the respondent parish offered in evidence, and duly proved, the paper writing following:—

“Town of *Romsey Infra*, in the county of *Southampton*.—The examination of *Richard Roe Carden*, a private soldier in his Majesty’s 25th regiment of foot, taken on oath before us, two of His Majesty’s justices of the peace for the said town, the 6th day of *April* 1782, touching the place of his last legal settlement.

The said examinant on his oath saith, that he was born in the parish of *Romsey Infra* aforesaid, as he hath

Where an examination of a soldier, taken before two magistrates, was tendered in evidence to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction: Held, that it was not admissible.

(a) The Judges of this court sat, as on former occasions, from *Wednesday*, the 13th day of *February*, to *Thursday* the 21st day of *February* inclusive. During that period, this and the following cases were argued and determined.

1828.

The King
against
The Inhabit-
ants of
ALL SAINTS,
SOUTHAMPTON.

heard and verily believes, where his father was a settled parishioner. That about fifteen years ago last harvest, he hired himself as a covenant servant for a year to David Pallart, of the parish of *All Saints*, in the town and county of the town of *Southampton*, esquire, at the wages of *4*l.**, and in consequence thereof he entered into the service of the said *David Pallart*, and served him there till about *Christmas* following, when this examinant went with his master and his family to *London*, where he stayed with him about three months, when he returned with his said master to the said parish of *All Saints*, and continued in his said master's service there during the remainder of the said year, and at the expiration thereof he received his full year's wages. And that he hath never done any act since to his knowledge whereby to gain a settlement, and that he hath a wife named *Elizabeth*, and one child named *Moses*, aged two years and upwards.

(Signed) "RICHARD BOE GARDEN."

"Sworn the day and year above mentioned, before us."

(Signed) "WILLIAM BIGGS, Mayor."

"THOMAS DAWKIN."

The appellant parish objected to the Court's receiving this paper, inasmuch as it did not appear on the face of it, that, at the time the examination was taken the soldier was quartered in the town of *Romsey*, *Infra*, and therefore was not a due examination within the provision and meaning of the mutiny act. The Court, however, found the paper to be a due examination under the mutiny act, and thereupon confirmed the order.

The

The question for the opinion of the Court is, whether such paper writing was a due examination within the provisions of the mutiny act or not. If it was, then the original order and order of sessions to stand; but if not, then the said orders to be quashed.

1838.
The King
against
The Inhabitants
of
ALL SAINTS,
SOUTHWICK.

Dampier in support of the order of sessions. If it can be shewn that the examination in question was taken under the mutiny act, it was admissible in evidence. Now the 22 G. 3. c. 4, the mutiny act in force at the time of the examination, gives power to two justices to take the examination, provided the soldier has a wife or child. It appears on the face of this examination that the party was a soldier, and had a wife and child, and it was subscribed by the two justices who administered the oath. It must, therefore, have been a proceeding under the statute. It will be objected that it was not shewn that the soldier was quartered at the place where he was examined, but the document is now forty-five years old; parol evidence of the fact could not therefore be expected. And, in the absence of any evidence to the contrary, it must be presumed that the soldier was in quarters with his regiment, and that the magistrates acted regularly. If this were a conviction, it might, perhaps, be insufficient; but proceedings of this nature have never been construed so strictly. The dictum of Lord Ellenborough in *Rev. v. Akstrey* (a), that the authority of magistrates must appear upon the face of their proceedings, was not upon a point then before the Court; besides, it was used with reference to orders

(a) 10 G. 3. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

CASES IN HILARY TERM

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and other things of that nature, which third persons are bound at their peril to obey.

See also
The Inhabit-
ants of
Ald. St. Mary,
Southampton.

Carter and Poulter contra. In several cases the objection now taken to receiving this examination in evidence has been suggested, and in each of them the examination was rejected, although not upon that precise ground, *Rex v. Clayton le Moors* (a), *Rex v. Warley* (b), *Rex v. Bilton* (c). In all proceedings of magistrates in any way analogous to this, their jurisdiction must appear on the face of them. Many orders of removal and orders for relief of paupers have been quashed on the ground that the jurisdiction did not appear, *Rex v. Chivers Cotton* (d), *Rex v. Holme* (e), *Rex v. Stoke Urry* (f), *Rex v. Tupper* (g); and the same rule has been applied to commitments, *Rex v. Hall* (h), *Rex v. York* (i); and to orders for payment of tithes or of wages, *Rex v. Furness* (k), *Rex v. Corbett* (l), *Rex v. Helling* (m); and to orders for dismissing servants from their service, *Rex v. Hulcott* (n). Here the magistrates had not power to examine any soldier touching the place of his settlement, but only such as were quartered within the place for which they were justices. The examination in question should therefore have stated that the party was quartered within the town of Southampton.

(a) 5 T. R. 304.

(c) 1 East, 14.

(e) 11 East, 380.

(g) 1 Str. 9.

(i) 5 Burr. 2684.

(l) 3 Salk. 261.

(n) 6 T. R. 523.

(b) 6 T. R. 534.

(d) 8 T. R. 178.

(f) 1 Str. 9.

(h) 3 Burr. 1636.

(k) 1 Str. 263.

(m) 1 Str. 7.

BAYLEY J. I am of opinion that the examination given in evidence in this case was not properly admissible, and that the order of sessions must be quashed. The mutiny act 22 G. 3. gave to the justices a special power, to examine, without which the examination would have been wholly extra-judicial. They had no jurisdiction except in the case of a soldier quartered in the place for which they were justices; it was therefore necessary to make out either aliunde or by the examination itself that the party examined was a soldier, and at that time quartered within that place. The case of the *Banbury Peerage* (a) is expressly in point. An attempt was made to prove a reputation as to pedigree by a bill and answer in equity, and depositions which purported to be made by servants in the family; and one question proposed by the House of Lords to the Judges was, whether those depositions were evidence that the parties making them were servants in the family, or whether that fact must be proved aliunde; and they held that it must be so proved. In the present case I am inclined to think it should have been proved aliunde that the party examined was a soldier, otherwise the examination must be considered as proof of the fact, which gave the justices jurisdiction; and, at all events, it should have appeared on the face of the examination that he was quartered at *Southampton*. In the case of *Regina v. Gouche* (b) it was held that jurisdiction shall be presumed unless the contrary appears; but that was overruled in *Rex v. Helling* (c), and the latter opinion was confirmed by Lord *Kenyon* in *Rex v. Hulcott* (d), after considering all the authorities. In

1828.

The King's
 against
 The Inhabitants of
 Ant. Garret,
 Defendant.

(a) 2 Selw. N. P. 743.

(b) 2 Bult. 441.

(c) 1 Str. 7.

(d) 6 T. R. 583.

1898:

THE KING
 against
THE INHABITANTS
 of
KISWORTH
 HARDCOURT.

principle I cannot find any distinction between this case and those relating to orders; in the latter the jurisdiction must appear on the face of the order, and I think it should in this case also; and for want of this the examination ought not to have been received in evidence. *HOLROYD J.* The rule, that in inferior courts and proceedings by magistrates the maxim *omnis presumptio rite esse nata* does not apply to give jurisdiction, has never been questioned. Here, then, the jurisdiction should, at all events, have appeared on the face of the examination, supposing proof of it should not to have been necessary.

HOLROYD J. Order of sessions quashed. *THE KING* against *THE INHABITANTS OF KISWORTH HARDCOURT*.

TWO justices, by their order, removed *James Alder*, with his wife and their five children, from the township of *Kisworth Beauchamp* to the township of *Kisworth Harcourt*, both in the county of *Leicestershire*.

The sessions, on appeal, confirmed the order, subject to the opinion of the Court of King's Bench, on the following case:—

After proof of a *prima facie* settlement in the appellant township it appeared, that about *Lady-day* 1893, the pauper took of one *Thomas Bradshaw* a house and garden, situated in the township of *Kisworth Beauchamp*, at the rent of 10*l.* for a year, to commence at the en-

Where a pauper *bond fide* hired a house and garden in *A.* for a year at the rent of 10*l.*, and occupied it for a year, and the whole rent was paid to the landlord, but not by the pauper: Held, that he nevertheless gained a settlement in *A.*, inasmuch as the statute 6 G. 4. c. 57. did not require that the rent should be paid by him.

suing

suing *Michaelmas*. The house and garden were then in the occupation of one *Cooper*, whose term in them expired at *Michaelmas*; but Mr. *Bradshaw* said he should expect Mr. *Cooper* to stand as tenant till *Michaelmas*, and should expect the rent when Mr. *Matthew Waterfield*, who was tenant of other lands to Mr. *Bradshaw*, paid his, and it should be all put in one receipt. The pauper was let into possession immediately by *Cooper*, and paid rent up to *Michaelmas* to him (*Cooper*), after which time he continued to occupy the premises, and paid rent, as after mentioned, until *Michaelmas* 1826. Early in the pauper's tenancy, *Matthew Waterfield*, then being churchwarden of the township of *Kilworth Beauchamp*, called upon the pauper, and represented to him that *Bradshaw* had let the pauper's premises, together with other lands, to himself (*Waterfield*), and that he (pauper) was thenceforward to pay the rent quarterly to him. At the same time *Waterfield* told the pauper that he should make a reduction in his rent of 8s. a year, to which reduction the pauper assented, and a rent of 9l. 12s. was accordingly paid by the pauper to *Waterfield*, in the course of that year by four quarterly payments, as follows, viz. the first two payments to *Matthew Waterfield*, and the last two, after the death of *Matthew*, to *John Waterfield*, his brother and successor in the farm. At the end of the year the sum of 55l. was carried by *John Waterfield* to the landlord, *Bradshaw*, which sum included 10l. the pauper's rent of the house and garden for the year first completed; and the residue was composed of the rent of the other land occupied by *Waterfield*. *Bradshaw* returned 54l. to *Waterfield*, and gave him one receipt for the rent. It further appeared, that *John Waterfield* was

1822

The King
against
The Infants
of
Kilworth
Harcourt.

1828.

**The King
against
The Inhabit-
ants of
Kilworth
Harcourt.**

reimbursed out of the parish funds for the sum of 8s. paid by him to the landlord, over and above the 9*l.* 12s. received from the pauper. The court of quarter sessions found that there was fraud in this case on the part of the township of *Kilworth Beauchamp*, but that neither the landlord nor the pauper were parties to the fraud.

Readen and *Hunfrey* in support of the order of sessions. The case depends upon the words of the statute 6 G. 4. c. 57, which makes it necessary, to the gaining of a settlement by renting a tenement, that it should be bona fide rented by the pauper, at and for the sum of 10*l.* a year at the least; and that it should be occupied under such yearly hiring, and the rent paid for one whole year at the least. It is stated in the case, that the pauper took premises for a year at the rent of 10*l.* The first thing required by the statute was, therefore, done; but he did not occupy it for a year under that hiring. [Bayley J. The bargain made by the landlord could not be destroyed by that which was done by *Waterfield*.] The landlord's act of receiving the rent from *Waterfield* in one gross sum for the premises in question, together with others, raises an inference that the landlord had agreed to take him as tenant; and the case states that the pauper assented to hold of *Waterfield* at the reduced rent of 9*l.* 12s., which was the whole amount of rent ever paid by the pauper.

Dwarris and *Hildyard*, contra, were stopped by the Court.

BAYLEY J. If the stat. 6 G. 4. c. 57. had required that the rent should be paid by the pauper, there would have been

been some difficulty in overcoming the fraud found by the sessions. But the requisites mentioned in that statute are, that the premises should be bona fide rented by the pauper at the sum of 10*l.* a year at the least, for the term of one whole year, and should be occupied under such yearly hiring, and the rent actually paid for one whole year at the least. It does not require that the rent should be paid by the tenant. Now the facts stated in the case shew that the premises were rented for one whole year, at the rent of 10*l.*, and that that rent was actually paid for one whole year. I also think, that the pauper occupied the premises for one whole year, under that hiring; for nothing that was done by *Watts* could have the effect of vitiating the original tenancy created between the pauper and the owner of the premises. The pauper remained tenant under the original taking, and the landlord might have distrained upon him for the rent of 10*l.*, if it had been in arrear. I therefore think that a settlement was gained in *Kilworth Beauchamp*, and the orders of removal and confirmation must be quashed.

Holborn J. concurred.

Both orders quashed.

1828:

The King
against
The Inhabit-
ants of
Kilworth
Beauchamp.

1829.

Benjamin Chapman v. John Smith & Co.

HOLDSWORTH and Another against WISS and Others.

Where a ship, being in a very leaky state, was deserted at sea by her crew, acting bona fide for the preservation of their lives, and was, on the following day, found and taken possession of by the crew of another vessel, who succeeded in taking her into port, where she was repaired, and afterwards sent to this country, but subject to claims for salvage and repairs equal to or exceeding her value:

Held, that the owners having given notice of abandonment before they received any tidings of the ship's safety, were entitled to recover against the underwriters as for a total loss.

ASSUMPSIT on a policy of insurance on the ship *Wesley*, valued at £500, at and from Belfast to her port or ports of landing in British America (river St. Lawrence excepted) during her stay there, and back to a port of discharge in the United Kingdom, between *Belfast* and *Glasgow*, on the west side of England and Scotland, or a safe port in Ireland, to call at Cork for orders. Averment, that the vessel sailed from Belfast to St. Andrews, New Brunswick, being a port in British America, not on the river St. Lawrence, and afterwards departed thence back to her port of discharge, to wit, *Valentin*, being a safe port in Ireland, and on her homeward voyage was totally lost, by perils of the sea. Plea, the general issue. At the trial before *Halloo B.*, at the *Lancaster Summer assizes 1829*, it appeared, that the vessel sailed from Belfast, in ballast, on the 23d of June 1826, at which time she was seaworthy. She arrived at St. Andrews on the 22d of August, and sailed thence, on her homeward voyage, on the 16th of September, laden with timber. At that time the vessel made eight or ten inches of water an hour, and the crew were obliged to pump her out every two hours. She continued in the same state until the 20th of September, when she encountered a gale of wind, by which she was much strained, and afterwards was found to be so leaky that the crew thought it necessary to abandon her. On the 23d they hoisted a signal of distress,

distress, and a vessel called the *Columbia* seeing it, bore down to her assistance, and took the crew on board. No attempt was made by the crew of the *Columbia* to save the *Westbury*, but they sailed for Boston, and there landed the crew of the *Westbury*. On the 6th of November the plaintiffs gave notice of abandonment to the agent of the underwriters at Liverpool. On the 24th of September, the day after the *Westbury* was deserted by her crew, she was found by an American vessel called the *Bobolink*, and the captain put some men on board, who succeeded in navigating her to New York, where she arrived on the 14th of October, and intelligence of her arrival at that port was received at Liverpool on the 16th of November. The *Westbury*, on her arrival at New York, was taken possession of by the British consul, and under his sanction was repaired by Messrs. Barclay, agents for Lloyd's at New York. The expense of the repairs, together with salvage, amounted to £1000, and a bottomry bond was granted by the captain (who was appointed by the British consul), to Messrs. Barclay for £500. She then sailed for Liverpool, and on her arrival there, possession of her was taken by Messrs. Barclay and Co., claiming title under the bottomry bond, and a right to be reimbursed other expenses incurred, making their demand above £1000. The vessel met with further damage in the river and sea; the repairs whereof were estimated at £550. The learned Judge left it to the jury to say whether the ship was still worthy when she sailed from Belfast. Whether the captain and crew acted bona fide in deserting the ship, and whether notice of abandonment was given in a reasonable time. The jury answered all the questions in the affirmative, and found for the plaintiffs for a total loss.

1828.

HOLDSWORTH
against
WIST.

loss. In *Michaelmas* term a rule nisi for a new trial was obtained on two grounds; viz. that the misconduct of the captain in sailing from *Boston* with a vessel making ten inches of water per hour exonerated the underwriters, and that the loss was at all events only an average, and not a total loss.

Pollock and *Parke* shewed cause. The jury found that the ship was sea-worthy at the commencement of the voyage; her condition when at *Boston* was therefore immaterial. Supposing the captain to have acted imprudently in leaving that port with his ship in such a condition as to require pumping every two hours, still that was nothing more than negligence on his part, which does not discharge the underwriters, *Busk v. Royal Exchange Assurance* (a), *Bishop v. Pentland* (b). [*Bayley J. Walker v. Maitland* (c) is to the same effect.] Several facts applicable to the second point are perfectly clear. The vessel was deserted by the crew acting bonâ fide for their own preservation. Notice of abandonment was given before the news of her safety had been received, and when she arrived at *Liverpool* she was subject to a charge of 1200*l.*, and incurred fresh damage in the river to the extent of 858*l.* The declaration alleges that the subject-matter of the insurance has been totally lost to the proprietor, that it has become of no use or value to him. Did, then, the desertion of the ship in consequence of perils of the sea produce a total loss? At one period of time, no doubt, the loss was total. Has the ship ever been beneficially restored to the assured? She has not, in fact, been restored at

(a) 2 B. & A. 75.

(b) 7 B. & C. 219.

(c) 5 B. & A. 171.

all. She is still in possession of the salvors; but actual restoration of the ship in specie, if not beneficial, would not suffice to change the total into an average loss, *McIver v. Henderson* (a). The case of *Thornely v. Hebson* (b) was very different; there the vessel was never entirely deserted, and there never was at any time a total loss; the vessel was always in the possession of persons acting for the benefit of the original owners.

1828.

HOLDSWORTH
against
WILK.

Brougham and *Starkie* contra. It must be admitted that the vessel was sea-worthy when she sailed for *Boston*, so that the implied warranty of sea-worthiness was fulfilled; but there was another implied warranty, viz. that there should be a captain and crew of competent skill, *Tait v. Levi* (c). In *Tatham v. Hodgson* (d) *Lawrence J.* says, "I do not know that it was ever decided that a loss arising from a mistake of the captain was a loss within the perils of the seas." A policy of insurance on a ship must, in like manner as all other policies, be subject to this qualification, that the subject-matter of insurance shall not be exposed to any unreasonable degree of risk. Here the captain must have been grossly ignorant, and exposed the ship to a very unwarrantable danger by sailing from *Boston* when his ship was so leaky as to make eight or ten inches of water an hour. Then as to the second point, *Thornely v. Hebson* is a strong authority for the defendants. There the vessel was abandoned by the crew, but taken possession of on the same day by other persons, and it was held not to be a total loss. Here, the vessel was

(a) 4 M. & S. 576.

(b) 2 B. & A. 513.

(c) 14 East, 481.

(d) 6 T. R. 659.

1888.

Holt v. Holt
against
Holt.

taken possession of on the morning after the crew left her, but whether she were left deserted a few hours more or less, cannot affect the question of total or average loss. In cases of recapture, the loss is not total if the ship be in good safety at the time of bringing the action, *Faulkner v. Ritchie* (a), and the same principle must apply to a case of this nature, where the vessel has been once deserted, but possession afterwards taken by other persons, and the vessel brought into a place of safety before action brought.

BAYLEY J. I abstain from delivering my opinion upon the first point, because there is another case pending in this Court, in which the question as to the effect of negligence in the captain of a ship will be again discussed (b). Upon the other point there is no difficulty. If the subject-matter of insurance ultimately exists in specie, so as to be capable of being restored to the hands of the assured, there cannot be a total loss.

(a) 12 M. & W. 290.

(b) The case alluded to by the learned Judge was *Shaw v. Foster*, the trial of which it had been stated by Port J. that the defendant, the underwriter, was not liable if the loss was occasioned by the negligence of the crew. A verdict was returned for the defendant, and a writ of *certiorari* was granted, which came on for argument in this court in Trinity term, when

the learned Judge, after having heard the evidence, and the arguments of the counsel, delivered his judgment, in which he said that the defendant was not liable, and that the underwriter was not discharged from liability where a loss arises through the negligence of the captain and crew.

Lord TENNYSON C.J. said, We are all of opinion that underwriters are responsible for the misconduct or negligence of the captain and crew; but the other side, who contend that the loss is not a total loss, unless

Rule absolute.

unless

unless there has been an abandonment. Now, in order to justify an abandonment, there must have been that, in the course of the voyage, which at the time constituted a total loss. Thus, capture or the necessary desertion of the ship constitutes a total loss. Here, then, for a time, there was a total loss. The crew of the *Westbury* were taken on board the *Columbia*, and no effort was made by the crew of the latter vessel to save the *Westbury*, probably because her situation appeared to be hopeless. Then notice of abandonment was given, at which time no tidings of the *Westbury* had been received, and she did not arrive until long afterwards. If at one period of time there was a total loss and an abandonment before news of the vessel's safety had been received, her subsequent return did not entitle the underwriters to say that it was no longer a total loss. The case of *Thornely v. Henson* may be laid out of the question, for the single point decided there was, that there had not been at any period of time a total loss.

There are cases which shew, that the mere existence of a ship after a total loss and abandonment will not reduce it to a case of partial loss, *M'Tier v. Henderson* (a), *Cologne v. The London Assurance Company* (b). The ship must be in esse in this kingdom under such circumstances, that the assured may, if they please, have possession, and may reasonably be expected to take it. Here such circumstances do not exist. The ship was valued at 1800*l.* in the policy; she came back subject to a charge of 1200*l.*, and in the river at *Liverpool* sustained further damage to the extent of 858*l.* There was no prospect that she could be of sufficient value to

1828.

Not a word
by any
Wm.

(a) 4 M. & S. 576.

(b) 5 M. & S. 147.

1828.

HEMSTONCH
against
Wm.

make it worth while for the assured to take her again. The loss was therefore total, and the abandonment good.

HOLROYD and LITTLEDALE Js. concurred.

SANDON against PROCTOR and Another.

Scire facias on recognisance of bail. Plea, no ca. sa. duly issued, lodged, and returned. Replication, ca. sa. issued and returned non est inventus. Rejoinder, that the ca. sa. did not lie in the sheriff's office four days exclusive of the day it was lodged, the return day, and an intervening Sunday. Demurrer: Held, upon demurrer, that the rejoinder was bad.

SCIRE facias upon a recognisance of bail. Plea, that no writ of ca. sa. was duly sued out against the principal upon the judgment, and duly lodged with the sheriff of *Middlesex*, (being the county in which the venue in the said action was laid) and duly returned, according to the custom and practice of the court. Replication, that a ca. sa., directed to the sheriff of *Middlesex* (being the county in which the venue in the said action against the principal was laid) issued against the principal; that the writ, before the return thereof, to wit, on the 18th of *May* 1827, was lodged with *C. F.* and *H. W.* sheriffs of *Middlesex*, to be executed, and that they returned non est inventus. Rejoinder (admitting that the plaintiff sued out the said writ of ca. sa., as in the replication alleged), that the return day of the writ of ca. sa. was the 23d of *May* 1827, and that the writ was lodged by the plaintiff with the sheriffs of *Middlesex* on the 18th day of *May* 1827, and not before, and that the 20th day of *May* 1827 was a *Sunday*; and so defendants say, that the writ of ca. sa. in the replication mentioned was not duly lodged with the sheriff of *Middlesex*, according to the custom and practice of the court. Demurrer. The causes of demurrer assigned were,

were, that the rejoinder was a departure from the plea, inasmuch as by the plea it was alleged that no ca. sa. was issued against the principal, whereas in the rejoinder it was admitted that a ca. sa. was issued; also, that the defendants had in their rejoinder pleaded and attempted to put in issue matters relating merely to the practice of the Court, and that the practice of the Court could not be pleaded.

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Patteson, in support of the demurrer. Assuming that the allegation in the plea that no ca. sa. was duly sued out, lodged, and returned, imports that it was not sued out, lodged, and returned, so as to enable the plaintiff to charge the bail, and, therefore, that, according to *Dudlow v. Watchhorn* (a), the rejoinder is not a departure from the plea; the demurrer raises the question, Whether the practice of the Court can be pleaded? The proceedings against the bail might undoubtedly have been set aside for irregularity, because the ca. sa. had not lain in the sheriff's office four days exclusive of the return-day and the intervening *Sunday*, as required by the practice of the Court. But that was a mere breach of a rule of practice, and the practice of the Court cannot be pleaded. *Elliott v. Lane* (b), and *Warmley v. Macey* (c). The very point in this case was decided on demurrer, in *Cherry v. Powell* (d); and the Court there said, that the point, whether matter of practice were pleadable, was not arguable. *Dudlow v. Watchhorn* is distinguishable. There the ca. sa. was issued into a wrong county; for, by the general rules of law, the ca.

(a) 16 East, 48.

(c) 5 B. Moore, 168.

(b) 1 Wils. 354.

(d) 1 D. & R. 50.

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sa. ought to be directed to the sheriff of that county where the venue in the original action was laid. That is not a matter required by any rule or practice of the Court, but by the general law of the land. A court of error must see, from the record, where the venue in the original action is, and into what county the ca. sa. issued, and would be bound to take notice of the general rule of law, that it could only issue into the county where the venue lies; but it could not take notice of the practice of another court.

Manning contra. If the plea that no ca. sa. was duly sued out is a good plea, the rejoinder in this case is good; for the suing out of a ca. sa. before the bail can be fixed is only required by the practice of the Court, and not by the condition of the recognizance. The condition is, that the defendant shall pay the damages or render. If he does neither, there is a breach of the condition, whether a ca. sa. be sued out or not. *Elliott v. Lane* (a) was decided on the ground of departure. [*Littledale J.* The case of *Ball v. Manucaptors of Russell* (b), decided in *Trinity Term*, 4 *Anne*, shews that a matter of irregularity cannot be pleaded. There, in *scire facias* against bail, the defendant pleaded that no *capias* was sued out and returned against the principal; the plaintiff replied a ca. sa. and set it out. Demurrer. One objection was, that the *capias* set out in the replication appeared to have but five days between the teste and return. As to that, it was answered and resolved by the Court, that there ought to be eight days between the teste and re-

(a) 1 *Wils.* 334.(b) 2 *Ld. Raym.* 1176. 2 *Salk.* 602.

turn of the *ca. sa.* against the principal, by the practice and course of the Court; and if the defendants had moved for irregularity, the Court would have helped them; but in point of law the process of this Court may be *re-ternable de die in diem*, especially when issued into *Middlesex*, and, therefore, they shall not take advantage of this, *which is but an irregularity on demurrer.*] The case of *Dudlow v. Watchhorn* (a) is inconsistent with that. In the latter case, Lord *Ellenborough* said, "We must take notice of the practice of the Court in a case like this, where it is the very subject matter of dispute, and is put in issue. For what purpose is the issuing the *ca. sa.* at all in this case except as matter of practice?" As to *Cherry v. Powell* (b), it was decided on the authority of *Elliott v. Lane*.

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BAYLEY J. The question in this case is, Whether it is an answer to an action on the recognizance, for the bail to say, that the *capias ad satisfaciendum*, sued out against the principal, had not lain in the sheriff's office for that period of time which by the rule of Court it ought to have done to charge the bail? In *Elliott v. Lane* (c), to *seire facias* against bail the defendant pleaded no *ca. sa.* against the principal; the plaintiff replied a *ca. sa.*, and a return *non est inventus*. The defendant rejoined that the *ca. sa.* did not lie four days in the sheriff's office, and upon demurrer the Court held the rejoinder to be bad. The decision appears by the report to have proceeded on the ground that the rejoinder was a departure from the plea; but if the matter alleged in the rejoinder had been a defence on the merits, the defendant would

(a) 16 *East*, 40.(b) 1 *D. & R.* 50.(c) 1 *Wils.* 354.

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undoubtedly have applied for leave to amend on payment of costs. No such application having been made, that case rather shews by inference that a mere irregularity cannot be pleaded. The same question presented itself to the consideration of this Court in *Powell v. Taylor*, Mich. 28 G.3. cited by Mr. Tidd in his *Practice* (a), to shew that the bail cannot take advantage of a mere irregularity, by pleading. He there says, "They (the bail) may also plead, in discharge of their liability, that there was no *capias ad satisfaciendum* sued out and returned against the principal, and if there be a void writ, it is as none. But if the writ be merely *irregular*, as if it was sued out after a year, without a *scire facias*, or made returnable on a day out of term, or if it has not lain four days in the sheriff's office, the bail cannot take advantage of the irregularity by pleading." In *Cherry v. Powell* (b) this Court again decided that such an irregularity could not be pleaded. But it is insisted, that the suing out of a *ca. sa.* against the principal is rendered necessary only by the rules and practice of the Court, and that as the omission to sue out a *ca. sa.* is a good plea, the matter stated in this rejoinder may also be pleaded. But it seems to me that the obligation to sue out a *ca. sa.* results by law from the terms of the recognizance. The language of the condition of the recognizance is, "if the principal shall not pay the damages, or render himself" The latter words, "or render himself," have been construed to import that the principal is to render in discharge of his bail only when the plaintiff has, by suing out a *ca. sa.*, intimated an intention to take the body of the

(a) P. 1129. 9th edit.

(b) 1 D. & B. 50.

defendant.

defendant. If the plaintiff elects to proceed by fieri facias or elegit, the bail are not bound to render the principal; so if the principal die before the ca. sa. is returnable, the bail are discharged, because they are not bound by the recognizance to render the principal before the return-day of the ca. sa. In *Hobs v. Tedcastle* (a), *Tedcastle* sued a bill of debt against *Holloway* in B. R.; who put in bail (*Hobs*, the plaintiff, and another); afterwards *Holloway*, the defendant, was condemned, and died before the condemnation satisfied or his body rendered, whereupon a scire facias was awarded against the bail, and after two nihil returned, execution was awarded, and the plaintiff taken in execution, whereupon he brought his audita querela, surmising the death of *Holloway* the defendant. There was not any capias awarded against him. The Court held, that the recognizance of the bail that the principal should render himself, &c. is to be intended, upon process awarded against him, &c. and that as there was not any process awarded against him in his lifetime, the bail were discharged, and judgment was given for the plaintiff. That case shews that the plea of no ca. sa. is a good plea, because by the construction put upon the terms of the recognizance, the bail are not bound to render their principal until the plaintiff sues out the ca. sa. The case of *Dudley v. Watchhorn* (b) was properly decided, because there was no valid ca. sa. sued out in that case. For it is a general rule of law, that the execution must pursue the judgment, and that a ca. sa. must be directed to the sheriff of that county in which the action is brought.

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(a) Cro. Eliz. 597.

(b) 16 Eas. 40.

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I am not aware of any case where a party who in pleading has relied upon the practice of the Court, has not failed. In *Donnelly v. Dunn (a)*, to an action on the recognizance of bail, the defendant pleaded the bankruptcy of his principal, and there was a general demurrer. The bankruptcy of the principal is a ground for an application to this Court to enter an exoneretur on the bail-piece. But it was decided that it could not be pleaded; and there *Buller J.* said, "It is of importance to the public and to the profession, to put an end to attempts to introduce upon the record questions of practice, which cannot be considered as legal defences, but which belong rather to what may be called the equity side of the Court. This action is brought for a legal demand, arising upon a debt of record; and the defendant is called upon to state a legal defence upon record, not merely to say that he has equity in his favour. Now, what legal defence has he set up? He must either shew a legal impossibility to perform the condition, or state something that will discharge him. Has he done either? Certainly not. Then the plaintiff remains unanswered." That applies to the present case, for the defendant here has neither shewn performance of, nor any legal excuse for, not performing, the condition of the recognizance.

HOLROYD J. I have entertained some doubts in this case, and those doubts were caused by some expressions which fell from the Court in *Dudley v. Watchhorn*. But I am now satisfied that a mere matter of practice cannot be pleaded. There is a material distinction between

(a) 2 Bos. & Pul. 45.

those things which are required to be done by the common or statute law of the land, and things required to be done by the rules or practice of the Court. Any thing required to be done by the law of the land must be noticed by a court of error; but a court of error cannot notice the practice of another court. A plea that no ca. sa. has issued, or that the defendant died before the return of the ca. sa., is good, because, according to the construction which the law puts on the recognizance of bail, the defendant is not required by law to render until the return day of the ca. sa. The party entering into the recognizance engages that the defendant shall pay the damage, *or render himself*. The latter words have been construed to import, not that the defendant is bound to render at all events, but only in case he is required by the plaintiff in the action so to do; and the suing out of the ca. sa. is notice to the bail that the plaintiff does require the defendant to be rendered. If this matter may be pleaded, a court of error may reverse our judgment. Any matter which may be taken advantage of in a court of error may properly be pleaded; but mere matter of irregularity, depending on the rules of another court, of which rules a court of error cannot be supposed to have any knowledge, cannot be pleaded.

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LITLEDALE J. Upon this record the practice of the Court of King's Bench is not stated, and a court of error cannot take notice of the practice of another court. The record is, therefore, defective. But if the practice of the Court had been set out on the record, it would make no difference. For the practice of the Court cannot be pleaded. That very point was decided in

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Ball v. The Manucaptors of Russell (a), to which I have already referred, and *Powell v. Taylor*, cited in *Tidd's Practice* (b), and in *Warnsley v. Macey* (c). The decision in *Dudlow v. Watchhorn* (d) was perfectly right, because by the general law of the land a ca. sa. must issue into the county in which the action was brought. Upon the authorities, therefore, I am of opinion, that, generally speaking, a mere rule or matter of practice cannot be pleaded. But then it is insisted, that the suing out a ca. sa. against the principal, in order to fix the bail, is required only by the rule or practice of the Court: I am of opinion that that is rendered necessary by the recognizance. The condition of the recognizance is, that the defendant shall pay the damages, or render himself. Now, if this had been a common contract, the principal would be bound to render within a reasonable time after the judgment; but inasmuch as the object of the recognizance is to secure to the plaintiff in the action satisfaction of his judgment, it has been construed with reference to that object; and as the plaintiff may at his election sue out execution either against the property or the person of the defendant, the condition has been held to be satisfied if the principal be rendered within a reasonable time after the plaintiff has notified his intention to have execution against the person of the defendant. As long ago as the 38 *Eliz.* it was held, that the render required in the recognizance was to be intended a render upon process awarded. The suing out of the process, therefore, is not a matter required by any rule or practice of the Court, but by the recognizance, and on that

(a) 2 *Ld. Raym.* 1170. *Salk.* 502.

(b) P. 1129. 9th edit.

(c) 5 *B. Moore*, 168.(d) 16 *East*, 40.

ground

ground it is a good plea; that no ca. sa. issued. But the recognizance does not require that the ca. sa. shall remain in the sheriff's office four days exclusive of the return day and an intervening *Sunday*. An allegation that it has not remained for that time in the sheriff's office, shews that the party has broken a rule of the Court, but not that the condition of the recognizance is satisfied.

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Judgment for the plaintiff.

CALVERT and Another *against* GORDON,
Executrix.

DEBT on bond of the testator, which upon oyer appeared to be conditioned for the fidelity of *R. Edwards*, as collecting clerk to the plaintiffs (brewers) whilst he should continue in their service. Plea, that *Edwards* continued in the service till the testator's death and till the defendant's notice thereafter mentioned, and during that time faithfully accounted; and that defendant, as executrix, within a short and reasonable time after the testator's death, and before any breach of the condition, gave notice in writing to the plaintiffs that she would no longer remain surety, or responsible; and if any damnification occurred after the giving of the notice, it was of the plaintiff's own wrong. Replication, that before the notice *Edwards* collected divers sums, amounting to 2000*l.*, for which he did not account; and for assigning a further breach, according to the statute, that he col-

Debt on bond. Plea, after craving oyer of bond and condition, which was, that *A. B.* should faithfully account for all monies received by him, as collecting clerk; that *A. B.* did account. Replication, that *A. B.* received divers sums, amounting to 2000*l.*, for which he did not account. Rejoinder, that the sums mentioned in the replication were three sums of 1000*l.*, 500*l.*, and 500*l.*, received by *A. B.* of *C. D.* and *F.* and *G.*, and

that *A. B.* accounted for those sums. Surrejoinder, that the sums mentioned in the replication were other and different sums than those alleged in the rejoinder to have been received and accounted for by *A. B.*, and concluding to the country. Held, upon special demurrer, that the surrejoinder was good.

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lected *divers sums after* the notice for which he did not account. Rejoinder, as to the first breach, that the same sums, stated in that breach to have been received and unaccounted for by *Edwards*, were three several sums of money, to wit, one of them being 1000*l.* part of those sums, was received from one *Gapp*; another part, viz. 500*l.*, from *J. Berkeley*; and the residue from *R. Cole*; and that *Edwards* duly accounted for them. And as to the second breach, that the sums mentioned in that breach to have been received and unaccounted for by *Edwards* were three, viz. 1000*l.* received from *W. Rumsey*, 500*l.* from *W. Burgess*, and the other 500*l.* from *H. Pearce*; and that *Edwards* duly accounted for them. Surrejoinder, as to both breaches (admitting that *Edwards* received and accounted for the sums mentioned in the rejoinder), that the sums mentioned in the breaches were *other and different sums* which *Edwards* collected, and for which he did not account. Special demurrer, assigning for cause, that the surrejoinder introduced new matter, and concluded to the country, and that it ought to have concluded with a verification, and to have specified the sums which *Edwards* collected, and from whom he received them.

R. Bayly, in support of the demurrer. First, the replication is bad, because it does not specify the persons from whom *Edwards* received the sums. There is a distinction in this respect between debt and covenant. In the latter, the breach assigned may be as large as the covenant; but in debt upon bond, conditioned to perform covenants specified in an indenture, a precise breach must be shewn, because a breach is a forfeiture of the whole bond; *Brigstock v. Stanion* (a).

(a) 1 *Ld. Raym.* 106.

In *Com. Dig. Pleader* (E 5.) it is laid down, that a plea that defendant had expended 310*l.* for repairs, *et alia onera necessaria*, is bad for uncertainty; for the defendant ought to shew for what charges he has expended them, by which the Court may judge whether they were necessary or not. In *Howe v. Roach* (a) the declaration stated, that the plaintiff was lawfully possessed of mines and ore gotten and to be gotten from them, and was in treaty for the sale of the ore, and that the defendant published an advertisement, cautioning persons against purchasing the ore, per quod he was prevented from selling. The defendant pleaded that *the adventurers* or persons having an interest or shares in the mines thought it their duty to caution persons against purchasing the ore, and it was held to be bad on special demurrer, because it did not disclose the names of the adventurers, or who they were. [Bayley J. Is there any instance of such a replication? The usual replication, to a plea of performance, is that used in the present case; and the usual mode of rejoining is, to allege that the clerk well and truly accounted, and to conclude to the country.] The rejoinder is not a departure from the plea, for the new matter only tends to fortify the plea, and may, therefore, be properly rejoined; *Long v. Jackson* (b). The surrejoinder is bad, because it introduces new matter, viz. that the sums mentioned in the breach were other and different sums from those for which *Edwards* had accounted, and concludes to the country. By so concluding to the country, the defendant is deprived of an opportunity of answering that new matter. It is a rule in pleading, that where either party introduces new matter, the other

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(a) 1 M. & S. 504.

(b) 2 Wils. 8.

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side shall have an opportunity of answering to that new matter; *Filewood v. Popplewell* (a).

Chilton, contra, was stopped by the Court.

BAYLIER J. I have no doubt as to the validity of the surrejoinder. It is unnecessary to decide whether the plea be good, though I entertain a very strong opinion that it is bad, on the ground that the obligation created by the bond cannot be determined at the will of either party by notice. It is clearly established by the authorities, that the plaintiff was not bound, in his replication, to set out the names of the persons from whom *Edwards* received the money. In *Steele v. Farrington* (b); to debt on bond conditioned for J. S. rendering account to the plaintiffs of all monies which he should receive as their agent, the defendant pleaded performance in the words of the condition. Plaintiffs replied that J. S. received divers sums of money amounting to £2000*l.*, belonging and relating to the plaintiffs' business as their agent, and had not rendered to them an account of the said £2000*l.*, or any part thereof; and this replication was demurred to, on the ground that it did not thereby appear from whom the sums mentioned in the replication were received, and it was held to be sufficient. And in *Barton v. Webb and Another*, *Executors of Jacques* (c), to debt on bond of the testator conditioned that one B. R. should faithfully account for and pay over to the plaintiffs, as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity, the defendants pleaded general performance;

(a) 2 Wils. 65. (b) 1 Bos. & P. 640. (c) 8 T. R. 459.

formance; the plaintiffs replied, that *B. R.* had received divers sums, amounting to a large sum, viz. 100%, from divers persons for divers voluntary contributions for the use of the said charity, which he had not accounted for or paid over; and on special demurrer, assigning for cause that it did not appear by the replication from whom the sums of money therein supposed to have been received by *B. R.* were received, it was held that the replication was sufficiently certain, and that the case of a surety and his executors stood exactly in the same situation as that of the principal himself. Upon these authorities, therefore, I am of opinion that the replication in this case is good. The defendant in his rejoinder alleges, that *Edwards* received certain specific sums from *A.*, *B.*, *C.*, and *D.*, &c. and accounted for those sums. The plaintiff in his surrejoinder says, that the sums mentioned in the breaches are other and different than those which the defendant is stated in the rejoinder to have accounted. That is not an allegation of any new matter, but merely a denial of the allegation in the rejoinder, that the same sums (viz. those mentioned in the replication), were three several sums of money, to wit, &c. The plaintiff, by alleging that they were different, denies that allegation in the rejoinder. I think, therefore, that the surrejoinder is good, and that the plaintiff is entitled to the judgment of the Court.

HOLROYD J. The regular mode of replying to this replication would have been to allege that *Edwards* had well and truly accounted, and to have concluded to the country. But the defendant has departed from the usual mode, and alleged in the rejoinder that the sums mentioned in the breaches assigned in the replication

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were certain specific sums received by *Edwards* from persons whose names are mentioned. The plaintiffs in their surrejoinder are thereby driven to vary from their usual surrejoinder, and they were at liberty to take issue on any of the facts stated in the rejoinder. One of those facts was, that the sums mentioned in the assignment of breaches to have been received by *Edwards*, and not accounted for by him, were specific sums received of *A., B., C., D., and E., F.* The plaintiffs in their surrejoinder had a right to deny that fact, and they have done so by alleging that these sums so stated in the replication to have been received and unaccounted for were different from those mentioned in the rejoinder. It would lead to an unnecessary length and prolixity of pleading if we were to hold that it was necessary to conclude such a surrejoinder with a verification.

LITTLEDALE J. The replication is in the form sanctioned by precedents. The rejoinder is not in the usual form. But if the rejoinder be good, the surrejoinder is also good, for it denies a fact stated in the rejoinder. The substantive allegation in the surrejoinder is, that the sums mentioned in the replication to have been received and unaccounted for by *Edwards*, were other and different from those alleged in the rejoinder to have been received and accounted for by him. That is a denial of a fact alleged in the rejoinder. The surrejoinder therefore properly concludes to the country.

Judgment for the plaintiff

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*In dem Reuther v. Ashbury & al. Hill reg.***MARSDEN and Another against STANFIELD.**

THIS was an issue directed by this Court, for the purpose of trying "whether a certain messuage or tenement, with the lands and appurtenances thereto belonging, commonly called or known by the name of *Hill Barn*, in the occupation of the defendant, or any part thereof, was situate within the chapelry of *Littleborough*, in the county palatine of *Lancaster*, and the bounds and limits thereof," the plaintiffs thereupon maintaining the affirmative, and the defendant the negative. At the trial before *Hullock B.*, at the last Summer assizes for the county of *Lancaster*, *James Cryer*, then occupying rateable property in the chapelry of *Littleborough*, was called as a witness on behalf of the plaintiffs, and after objection made as to his competency by the defendant's counsel, was admitted. In *Michaelmas* term last, upon motion for a new trial on the ground of the reception of such witness, the Court directed a special case to be stated, raising the question of the admissibility of the above witness. The questions for the opinion of the Court were:

Upon an issue whether a certain messuage is situated within a chapelry, a person who occupies rateable property within the chapelry is a competent witness to prove that it is.

First, Whether *Cryer* was a competent witness on this issue under the above circumstances?

Secondly, If he were incompetent at common law, whether such incompetence were not removed by the 54 G. 3. c. 170. s. 9.

Courtenay for the plaintiffs. The witness, although he had rateable property in the chapelry, was competent

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at common law to prove that the land in question was within the chapelry. If he had been actually rated, he would have been incompetent. But a mere liability to be rated does not disqualify, not even if his name be omitted out of the rate for the express purpose of using his testimony, *Rex v. Kirdford* (a). In *Dean v. Cook* (b), which was a question as to the boundaries of two adjoining parishes, it was held that a parishioner actually rated was not a competent witness to extend the boundaries of his parish, but that one *liable to be rated* was. In *Rhodes v. Ainsworth* (c) the owner of an estate was held to be an incompetent witness to negative the liability to repair a chapel, on the ground that he had a permanent interest. Assuming that the witness was incompetent at common law on the ground of interest, he was clearly rendered competent by the provisions of the statute, 54 G. 3. c. 179. s. 9. The issue is, Whether certain lands are within the chapelry; that is a matter relating to the rates and cesses. In *Meredith v. Gilpin* (d), on a question of title, in an action of trespass, between a parish and an individual, to certain lands claimed by the former under an inclosure act, by the provisions of which the land in dispute would (if they had a right to it) be vested in them in trust for the parish in aid of the poor's rates, it was held, that rated inhabitants were admissible witnesses, on the ground that the matter in issue had relation to rates and cesses, because the property, if recovered, would go in aid of the parish rates.

Alderson, contra, relied on *The Earl of Clanrickard v. Lady Denton* (e). There the issue was, Whether

(a) 2 East, 559.

(b) Cited in *Rex v. Kirdford*, 2 East, 562.

(c) 1 B. & A. 87.

(d) 6 Price, 146.

(e) 1 Gwill. 300.

there

There was a custom within the weald of *Kent*, that all owners and proprietors of any coppices or woods should be discharged of lithe for all manner of wood; the testimony of those who were entitled, either as owners or farmers, to any wood within the weald of *Kent*, was rejected, for the custom was alleged to be general through the whole weald, and though they were not parties to the suit, yet inasmuch as the custom concerned them in their private profit, and in this immunity, they were quasi parties, and their testimony quasi in propria causa.

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BAYLEY J. The issue in this case was, Whether a messuage and lands in the occupation of the defendant were within the chapelry of *Littleborough*? The question for our consideration is, Whether a person having rateable property in the chapelry was a competent witness to prove that it was? The burden of making out that the witness is incompetent lies on the party who makes the objection. It is not stated in this case what are the chapelry burdens, whether it maintains its own poor, roads, or chapel. The witness would not be competent to increase the number of contributors, unless the burden to be borne would thereby be subject to be increased, or his rights damaged by such increase. But the increase of the number of contributors would not only lessen each man's share of the chapel-rates, but would lessen also each man's privilege within the chapel, by increasing the number of claimants for seats and sepulture. So that there may, perhaps, viewing the case in this manner, be a balance of advantage and disadvantage, and we are bound to see that an interest does exist before we can say that this witness was in-

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competent. Now *Rex v. Kirdford* (a) establishes that the fact of a party being the occupier of rateable property in a parish, but for which he is not rated, does not make him an incompetent witness. Here the case only states that the witness was an occupier of rateable property. Upon the authority of that case, therefore, I am of opinion that he was competent at common law. I also think that this is a very plain case; according to the true construction of the 59 G. 3. c. 170. s. 9, which enacts, that no person rated, or liable to be rated, to any rates or cesses of any district, &c., shall before any court be deemed and taken to be, by reason thereof, an incompetent witness for or against such district in any matter relating to such rates or cesses, or to the boundary between such district and any adjoining district. The substantial question in this case is, Whether the owner of certain property was liable to contribute to the rates of the chapelry? That is a question relating to the rates or cesses of the district. And the question, Whether certain land be situate within the chapelry, was a matter relating to the boundary between the district and the adjoining district.

HOLROYD and LITTLEDALE Js. concurred.

Judgment for the Plaintiff.

(a) 2 East, 659.

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MELLISH against RICHARDSON.

(In Error.)

ASSUMPSIT on a special agreement. The declaration contained four special counts and three common counts. Plea, general issue. At the trial before Lord Gifford C. J., at the *London* sittings after *Hilary* term 1824, a general verdict was found for the defendant in error on all the counts in the declaration, with 750*l.* damages, and final judgment was signed in the Court of Common Pleas on the 17th of *July* 1824. A writ of error was brought in the Court of King's Bench, returnable in *Michaelmas* term following. The principal error assigned was, that the declaration did not set forth any good or sufficient consideration for any of the promises stated in the declaration, but no distinction was made in the assignment of errors between the different counts. The defendant (*Richardson*) joined in error. The case was argued before all the judges of this Court at the sittings in banc after *Trinity* term 1825, and judgment of reversal was pronounced on *Friday*, the 25th *November*, and a venire de novo was awarded, on the ground, that there did not appear on the face of the record to be any good or sufficient consideration for the promises alleged in the third and fourth counts of the declaration, and the judgment of reversal was entered of record at the opening of the office on the following day, and a writ of venire facias de novo awarded by the same court in eight days of *Saint Hilary*, in *Hilary* term 1826. The defendant in error, having been apprised of the intended reversal of the judg-

A general verdict was given for the plaintiff on a declaration consisting of several counts, some of which were bad in point of law. The evidence applied to all the counts. The court of Common Pleas, after writ of error brought, and after argument in the court of error, amended the postea by entering the verdict for the plaintiff on the first count, and for the defendant on the others; and amended the judgment-roll remaining in that court by the amended postea, after the judgment had been reversed by the King's Bench. Semble, That the court of King's Bench is bound to amend the record by the amended record of the court of Common Pleas.

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ment of the Court of Common Pleas, applied on the 8th of *November* to Lord *Gifford* to alter the *postea*, by confining the verdict to the first count of the declaration. Lord *Gifford*, being no longer a judge of the Court of Common Pleas, refused to interfere. On the 9th of *November* 1825, the defendant in error obtained in that court a rule nisi for amending the *postea* by the notes of Lord *Gifford*, by entering a verdict for the defendant in error on the first count of the declaration, and for the plaintiff in error on the other counts, and that rule was made absolute on the 24th *November* 1825. On *Friday* the 25th *November*, (being the day on which the judgment of reversal was pronounced by the Court of King's Bench) a rule nisi^(a) for amending and making the judgment-roll conformable to the *postea* was obtained, and that rule was made absolute on *Saturday* the 26th of *November* 1825, being after the judgment of reversal had been entered of record in the Court of King's Bench. On the same day the defendant in error obtained a rule nisi in this Court for staying the judgment of this Court, and for amending the judgment returned into this Court on the writ of error by the amended judgment of the Court of Common Pleas, which rule was, by consent of the plaintiff in error, enlarged to the fourth day of *Hilary* term 1826. In *Easter* term 1826,

Scarlett and *Barnewall* shewed cause against the rule. This amendment of the record in this Court, by the amended judgment-roll remaining in the Court of Common Pleas, ought not to be allowed. It appears by the affidavits, that the *postea* was amended by the Court of Common Pleas after the record had been removed into this

(a) *Wilde* Serjt., before the granting of this rule, informed the Court of C. P. that the judgment had been reversed in K. B.

Court, after joinder in error and argument; and that the judgment-roll of that Court was amended *after* the judgment of that Court had been reversed. First, the *postea* was improperly amended in the Court below. The rule is, that where general damages are given on a declaration containing several counts, and one count is defective, and the evidence at the trial applies to that count only, the verdict may be amended by the Judge's notes, and confined to the good count; but if the evidence applies to all the counts, the *postea* cannot be amended, because it is impossible for the judge to say on which of the counts the jury found the damages, or how they had apportioned them. In such a case, the only remedy is by awarding a *venire de novo*, and the Court of King's Bench acted upon this distinction in *Grant v. Astle* (a) and *Spencer v. Goter* (b). In *Holt v. Scholefield* (c), where some counts were good and others bad, and general damages given, this Court arrested the judgment, and refused to award a *venire de novo*, and the same thing was done in *Cook v. Cox* (d). *Williams v. Breedon* (e) will be relied on by the other side; but that case was decided on the ground, that it appeared sufficiently that the jury had calculated the damages on one count only. Assuming that the *postea* was amendable, it was not amended in due time or in proper manner, for the plaintiff below ought to have made his election in the term after the trial, on what count he would enter up his verdict, *Lee v. Muggeridge* (f), *Doe v. Perkins* (g). In *Harison v. King* (h), where a general verdict had been taken

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(a) *Doug.* 722.(b) 1 *H. Bl.* 78.(c) 6 *T. R.* 691.(d) 5 *M. & S.* 110.(e) 1 *Bos. & Pul.* 329.(f) 5 *Taunt.* 36.(g) 3 *T. R.* 749.(h) 1 *B. & A.* 161.

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for the plaintiff, the Court of King's Bench refused to allow the verdict to be entered on one count after a lapse of eight years, and the judgment had been reversed. The observations there made by Lord Tenterden apply strongly to the present case. The only cases in which the *postea* has been amended, by confining the verdict to particular counts, are *Hanky q. l. v. Smith* (a), *Eddowes v. Hopkins* (b), and *Williams v. Breckon* (c). But in all these cases the amendments were made before final judgment. There is no case where an amendment of this description has been made after final judgment and after a writ of error brought. In all those cases the *postea* was altered according to the actual finding of the jury, or according to what must have been the finding. The *postea* has been amended after error, where the mistake has appeared on the face of the proceedings, and it was not necessary to have recourse to the notes or memory of a Judge to rectify the mistake; as in *Wood v. Matthews* (d), *Doe v. Perkins* (e), and *Petrie v. Hannay* (f). Secondly, the *postea* ought not to have been amended by the Court of Common Pleas, but by the Judge who tried the cause, *Sandford v. Porter* (g). If the *postea* was not amendable, or if it was not amended in due time, or in a proper manner, it would not warrant the amendment of the judgment-roll; and even if the *postea* were properly amended, still the judgment-roll was not properly amended by the Court of Common Pleas. For when a writ of error on a judgment of the Court of Common Pleas is brought in the King's Bench, the record itself, and not merely a transcript, is removed into that

(a) *Barnes*, 449.(c) 1 *Bos. & Pul.* 329.(e) 3 *T. R.* 749.(g) 2 *Chit. Rep.* 351.(b) *Doug.* 376.(d) *Poph.* 102.(f) 3 *T. R.* 659.

Court. 40 Assiz. 29. Year Book, 22 Edm. 3. 6. pl. 24. E. N. B. 20 (F.) Roll. Abr. Error, 752, 753., Danvers's Abr. Error, (B 2.), Com. Dig. Pleading, (3 B 18.), Vin. Abr. tit. Error, (P), Bac. Abr. tit. Error, (B 2.) *Rutter v. Redstone* (a). The Chief Justice of the Common Pleas has certified that he has returned the record to this Court. In *Wood v. Matthews* (b), although the postea was amended in the Common Pleas after the record had been removed, the application to amend the record was made to the Court of King's Bench, where the record sent up from the Common Pleas was amended according to that which was indorsed on the back of the pannel; for the indorsement on the pannel was said to be the warrant for certifying the postea and for the entry on the roll. As to *Frend v. The Duke of Richmond* (c), what is there reported to have been said by Hale C. B. as to the obligation of the Court of King's Bench to amend a record amended by the Court of Common Pleas after it had been removed into the Court of King's Bench, is a mere obiter dictum. In *Pickwood v. Wright* (d), and *Moody v. Stracey* (e), it does not appear that the records at the time when the amendments were made had been removed by the writ of error into the King's Bench. In *Short v. Coffin* (f), *Petrie v. Hannay* (g), *Doe v. Perkins* (h), *Dunbar v. Hitchcock* (i), *Blackamore's case* (k), *Molyneux's case* (l), *Rutter v.*

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(a) 2 Str. 837. See *Andrews v. Lord Cromwell*, Yelv. 6 Cro. Eliz. 891. *Coot v. Linch*, 1 Ld. Raym. 427. *St. John v. Cumman*, Yelv. 118. *Pictr v. Haydon*, Cowp. 8451.

(b) Poph. 102.

(d) 1 H. Bl. 643.

(f) 5 Burr. 2730.

(h) 3 T. R. 749.

(k) 8 Co. 162.

(c) Hardr. 505.

(e) 4 Taunt. 588.

(g) 3 T. R. 639.

(i) 3 M. & S. 591.

(l) 2 Roll. Rep. 471.

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v. For (a), the judgment was not warranted by the verdict. In *Petrie v. Harvey* (b) there was a general verdict for the plaintiff. The officer had, by mistake, omitted to enter any verdict for the plaintiff on the issue joined on the plea of the statute of limitations. In *Dee v. Perkins* (c), the officer of the court had, by mistake, inserted in the postea matter not found by the jury. In *De Tastet v. Bucker* (d), the officer of the court had omitted to enter the finding of the jury on the issue joined on a plea of set-off. In *Grenville v. Smith* (e), which was an action against an executor, the officer entered up a judgment not warranted by law, the entry on the postea being right. There are other cases where the verdict has been for larger damages than those claimed by the plaintiff in his declaration, and a remittitur has been allowed to be entered on the record. But in those cases the officer of the court at Nisi Prius had before him the Nisi Prius record, which contained a statement of the amount of damages claimed by the plaintiff. The entry, therefore, of a larger sum than the plaintiff claims in his declaration, may fairly be considered a misprision of the clerk.

Assuming, however, that the Court has, by statute, the power to amend in this case, it is discretionary in them to exercise the power or not; and if the effect of allowing the amendment will be to prejudice the plaintiff in error, it ought not to be allowed. The application to amend was made to this Court after the judgment reversing the judgment of the Court of Common Pleas had been entered of record, and a venire de novo had been awarded. The judgment of the Court of Common Pleas became thereby destroyed, and the plaintiff in error be-

(a) Cro. Jac. 632.

(b) 3 T. R. 659.

(c) 3 T. R. 749.

(d) 3 Brod. & Bing. 65.

(e) Cro. Jac. 628.

came entitled to have his case submitted to another jury, upon whose verdict it would then depend whether he should ultimately succeed or not. If this amendment be allowed, the plaintiff will be deprived of the benefit to which he became entitled by the judgment pronounced by this Court. It is not, therefore, consistent with justice, that in this stage of the proceedings the amendment prayed for should be allowed.

1826.

Manant
against
Ratmancock

Murray and *Campbell* contra. The Court of Common Pleas were authorised by law to amend the postea, and the judgment-roll remaining in that court after the writ of error brought; and this Court is authorised by law, and ought, in affirmance of the judgment, so to amend the record here; for the associate of the Common Pleas has entered a verdict for the plaintiff on all the counts of the declaration, when it ought to have been entered on the first count only. That was a misprision of the associate at Nisi Prius; *Eddowes v. Hopkins* (a); and the entry made on the judgment-roll, according to the postea, was also a misprision of the clerk who made up the judgment-roll. And if it was a misprision of the clerk, the postea and judgment-roll may be amended at any time. The judge who tried the cause may at any time order the verdict to be entered up *nunc pro tunc*. But it is said, that the Court of Common Pleas ought not to have amended the judgment-roll after error brought, because the record of the judgment was by the writ of error removed into this Court; and in support of that objection it has been urged, that the Lord Chief Justice of the Court of Common Pleas has certified that he has returned the record and proceedings to this Court. The

(a) *Doug.* 376.

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Chief Justice of this Court makes a similar return to a writ of error brought in the Exchequer Chamber; and by the stat. 27 Eliz. c. 8., the Chief Justice of King's Bench is to cause the record, and all things concerning the judgment, to be brought before the Barons of the Exchequer Chamber. Yet the record undoubtedly remains in the King's Bench. There are numerous cases in which the Court of Common Pleas and this Court have, after error brought upon their judgments, attended the judgment-roll. In *Wood v. Matthews* (a), the issue in the Common Pleas was, whether one were taken by a *capias satisfaciendum* or not; and upon the trial thereof at Nisi Prius, the jury found for the plaintiff in this action, to wit, that the party was not taken by the said *capias*, and upon the back of the panel the entry was *dissonat pro quer.*; but on the back of the *postea* the clerk of the assizes certified the panel thus, to wit, that the jury say that no *capias* was awarded, which was otherwise than was put in issue or found by the jury, and the roll of the record was according to the *postea*; and upon this judgment given for the said *Matthews*, then plaintiff, upon which this variance between the issue and verdict was assigned for error; and after deliberation had upon this point, and this matter alleged by the defendant in the writ of error, and certified out of the Common Pleas, the Court awarded that the record sent up out of the Common Pleas by the writ of error should be amended according to that which was indorsed on the back of the panel; for the indorsement upon the panel was the warrant for the certifying of the *postea*; and so this warrant over to him that makes the entry upon the roll; and therefore, whereas it was alleged that the *postea* was amended in

(a) Popl. 102. Hyl. 58. 54x.

the Common Pleas *after* the record removed, it was holden to be well done there; for although the record were removed by the writ of error, yet the nisi prius, the postea, and the like, remain still there, as it is of the warrant of attorney and the like; and if the postea had not been amended there, but sent up with that which was indorsed upon the pannel, all shall be amended here according to that which was indorsed upon the pannel." In that case the Common Pleas amended the postea after error; and the Court of King's Bench also amended the record in their Court. In *Foster and Taylor's case* (a), "after error brought upon a judgment in Common Pleas, and after the record was certified into this Court, the Common Pleas amended a rasure of the record which was there: and this Court, after it had been assigned for error, and after argument, and some doubts expressed by some of the Judges, whether the amendment ought to have been made after the record had been transmitted to this Court, amended the record there." In *Hewings v. The Mayor, Commonalty, and Citizens of London* (b), "upon error of a judgment, in the Common Pleas, in debt brought by them upon an obligation of 40*l.*, the error assigned was, because the judgment was, that the mayor, commonalty, and citizens of London should recover the debt and 6*l.* for costs, eisdem majori et communitati adjudged (omitting civibus), and so no such corporation, which was held to be error. But afterwards, upon a motion in the Common Pleas, and upon examination and perusal of the docket-roll (where it was well entered) it was awarded to be amended. In that case the amendment was made, not only after error was assigned, but after the Court had expressed an opinion

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 Mansfield
 against
 Beaumont.

(a) *Poph. 186.* (b) *Cro. Car. 574.*

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in favour of the plaintiff in error. In *Pitts v. Hanway* (a), to assumpsit for money paid to the use of the defendant, and had and received by the defendant to the use of the plaintiff, as executor, and for money paid by the testator to the use of the defendant, and for money had and received to the use of the testator in separate counts, the defendants pleaded the general issue and the statute of limitations. A verdict having been found for the plaintiff generally on the first issue, and no notice taken of the last, the defendant brought a writ of error to the House of Lords, and assigned for error, that no verdict was given on the second plea; and this Court being the court in which the action was brought, after such error had been assigned, allowed the plaintiff to amend, according to the judge's notes, by adding a verdict for them on the second plea. In *Dor v. Perkins* (b), after a writ of error brought upon a judgment of this Court in the Exchequer Chamber, and after joinder in error there, Lord Leakeborough, who tried the cause, amended the postea by his notes, and Mr. J. Buller ordered the judgment roll to be amended by the amended postea; and the Court held, that the amendment had been properly made. In *De Traz v. Ruster* (c), after error brought, the Court of Exchequer Chamber amended the transcript, and the Court of King's Bench the postea. So in *Fisher v. Blackwell* (d), the Court of Common Pleas, after writ of error brought into this Court, and after in nullo est erratum pleaded, amended the judgment. In *Frend v. The Duke of Richmond* (e), Hale C. B. states, "that it is the constant practice, that if a record be removed into the King's Bench out of the Court of Common Pleas, by writ of error,

(a) 5 T. R. 659.

(b) 3 T. R. 749.

(c) 3 Brod. & Bing. 65.

(d) Barnes's Notes, p. 7.

(e) Hardr. 505.

and afterwards amended by rule of Court in the Common Pleas, the Court of King's Bench must amend it accordingly, but, without such rule they must not amend it; so if a record removed hither be mistaken, it is amendable by the record in the Common Pleas, brought into this Court by an officer out of the Common Pleas, because these things are in affirmance of the first judgment, and, therefore, favoured in law." These authorities shew that an error in the record, caused by a misprision or mistake of the clerk, may be amended after error brought, by the court where the action was commenced.

It is contended, however, that the entry of a general verdict, in a case where the declaration contains several counts, some of them being bad, which was actually found by the jury, is not a misprision of the clerk. In *Mason v. Roe* (a) in an ejectment in the Common Pleas, judgment was that the plaintiff recover possession of a messuage, sixty acres of land, fifteen acres of meadow, and fifteen acres of pasture, but the verdict was entered for a messuage, ten acres of meadow, and thirteen acres of pasture, and for the residue, not guilty; and after error brought and assigned in this Court, it was held that this was a misprision of the clerk, who had not entered the judgment according to the verdict, and, therefore, that the judgment was amendable. That is an authority to shew that the entry of the judgment, contrary to the verdict entered on the postea, is a misprision of the clerk. Several authorities are cited in that case; among others, *Whitby's case*, where the misentry of the verdict was held to be but a misprision of the clerk. In *Grenville v. Smith, Executor* (b), which was an action of covenant brought for non-payment by testator of 400*l.* there was a verdict for 420*l.*, and for

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(a) *Cro. Jac.* 632.(b) *Cro. Jac.* 628.

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costs 53s. 4d. The entry upon the postea was, that the plaintiff should recover the damages 400*l.* de bonis testatoris si tantum, et si non; then the costs de bonis propriis; but the entry of the judgment upon the roll was, that he should recover the damages de bonis testatoris si tantum, et si non, then de bonis propriis; and this was held to be a mere misprision of the clerk. For the entry upon the postea was well, and that was his warrant for entering it upon the roll, and his entering it otherwise was a fault of the clerk, and this was amended upon view of the postea. Then, too, the amendment was made by the King's Bench, and, after diminution alleged in the Exchequer Chamber, a certiorari was awarded to certify it; and, after diminution, it being certified according to the amendment, the judgment was affirmed. An anonymous case, in 2 *Roll. Rep.* 471. shows that there may be a certiorari at any time. In *Short v. Coffer* (a) the Court of King's Bench, after in nolle est erratum pleaded, and after argument in the Exchequer Chamber, amended a judgment which had been entered against an executor de bonis propriis, by making it de bonis testatoris, &c., et de bonis propriis si non, &c., upon the ground that the mis-entry of the judgment was a mistake of the clerk; and in *Chapman v. Gale* (b) there cited, the mistake of the clerk of the attorney was held to be a misprision within the statutes of amendment. In *Bibbwood v. Wright* (c), *Hardy v. Cathcart* (d), and *Usher v. Dansey* (e), the verdicts had been given for larger damages than those laid in the declaration; and, after error assigned on that ground, the plaintiffs below were allowed to enter on the record a remission of damages.

(a) 5 *Burr.* 2730.(b) 2 *Lev.* 32.(c) 1 *H. Bl.* 602.(d) 1 *Marsh.* 100.(e) 4 *M. & S.* 26.

In those cases, the officer of the Court entered the verdict found by the jury, and warranted by the evidence, and yet such entry was held to be a misprision of the clerk. These authorities establish, that the entry on the postea of a verdict, other than that which the party in whose favour the jury have found is by law entitled to have entered for him, is considered a misprision of the clerk, within the meaning of those words in the statutes of amendments.

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There are several authorities (besides those already cited) to shew that an amendment may be made by the court of error. Thus in *Danbar v. Hitchcock* (a), after error brought from the Common Pleas into this Court, and from this Court into *Dom. Proc.*, this Court allowed an amendment to be made in the record by inserting the certificate of the judge who tried the cause, allowing the plaintiff treble costs, which had been omitted by the clerk in entering judgment in the Common Pleas, also by inserting the true terms in which the assignment of errors and joinder were made, instead of an entry on the judgment roll by the clerk of this Court, that they were made on an impossible day in another term, although both these errors were assigned in *Dom. Proc.*, and this was after judgment of the Court below had been affirmed in the King's Bench; and in *Meredith v. Davis* (b) the Court ex officio awarded a certiorari to supply a defect in the body of the record, after in nullo est erratum had been pleaded in the court of error. In that case the certiorari was granted after argument, and after the Court had expressed an opinion that the objection assigned as error was fatal. So in *Franklin v. Reeves* (c), in trespass for taking dung, which was not alleged to be dung of the

(a) 5 M. & S. 591.

(b) 2 Salk. 270.

(c) *Ans. temp. Elizabeth* 118.

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plaintiff, upon error brought, the objection was held fatal; but Lord *Hardwicke* says, that it was cured by the recital in the original writ, that the defendant might remove the original by certiorari, and that the Court might award such a certiorari, though no diminution be alleged, ad inform. conscien. cur; and the same thing is laid down in *Bac. Abr.*, Error, E. In *Rees v. Morgan* (a) the defendant in replevin made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, without finding either the amount of the rent in arrear, or the value of the cattle distrained, and judgment was entered for the damages assessed; this Court (being the court of error) permitted the defendant to amend his judgment, and to enter a judgment at common law pro retro no habendo. These authorities shew that wherever the Court may, by inspecting the record, amend the judgment, they ought to award a certiorari to bring the judgment before them; and if so, the Court in this case ought either to award a certiorari, or to inspect the record of the Court of Common Pleas, and amend the record here according to it. No instance can be found where the Court, in which the action is brought, having amended, the court of error have refused to amend. In *Harrison v. King* (b), no application was made to the Court in which the action was brought to make the amendment, and there had been a lapse of eight years before any application was made to this Court.

On the 23rd of *February* 1827 the judgment of the Court was delivered by *BAXTER J.*:

We have paid great attention to this case, and there being a difference of opinion among the Judges, we

(a) 3 T. R. 349.

(b) 1 B. & A. 161.

think

think it right to state the facts upon the record, so that a court of error may have an opportunity of considering, whether the amendment which we have required to be made ought to be made or not. We have drawn out the entry, and will deliver it to the clerk of the rules, and he will deliver a copy to each of the parties. I forbear giving any opinion upon the case, thinking it better that it should go without prejudice to the court of error, where the question may be considered, whether the amendment was properly made or not.

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Rule absolute. (a)

St. Martin v. Church. 12 Nov. 1828.

(a) The following is a copy of the entry mentioned by the learned Judge.

After the joinder in error, the record set out various continuances, until in fifteen days of *St. Martin* in *Michaelmas* term, 6 G. 4., and then proceeded as follows: At which day, before our said lord the king at *Westminster*, come the parties aforesaid, by their attornies aforesaid, and hereupon, as well the record and proceedings aforesaid, and the judgment aforesaid in form aforesaid given, as the matters aforesaid by the said *W. Mellish* above for error assigned, being seen, and by the Court of our said lord the king now here fully understood, and mature deliberation being thereupon had, it appears to the said Court of our said lord the king now here, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error. Therefore, it is considered that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid be reversed, annulled, and altogether held for nothing; and that the said *W. Mellish* be restored to all things which he hath lost by reason of the said judgment, &c., and that the Court of our said lord the king now here, do award a *venire facias de novo*, and proceed according to law. Therefore, the sheriffs are commanded that they cause to come anew before our said lord the king in eight days of *St. Hilary*, wheresoever our said lord the king shall then be in *England*, twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., because as well, &c., the same day is given to the parties aforesaid, &c., before which, in eight days of *St. Hilary*, that is to say, on *Monday* next after fifteen days of *St. Martin* in this same *Michaelmas* term, before our said lord the king at *Westminster*, come as well the said *G. Richardson* as the said *W. Mellish*, by their respective attornies aforesaid. And hereupon the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin* in this same *Michaelmas* term, gives the Court here to understand and be informed, that before the giving of the said judgment of the said Court of our said lord the king now here, that is

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to say, on *Thursday* the 10th day of *November*, in this same term, the following rule or order was made by the Court of our lord the king of the bench at *Westminster*, as to the roll or record of the proceedings of the said cause, wherein the said *G. Richardson* was plaintiff, and the said *W. Mellish* was defendant; that is to say, "Upon reading the record of *Nisi Prius* between the said parties, and the notes of the Right Honourable *Robert Lord Gifford*, late Lord Chief Justice of this court, and the affidavit of *P. P. gent.*, it is ordered, that the defendant, upon notice of this rule to be given to him or his attorney, shall shew cause to this Court on *Saturday* next why the postes in this cause should not be amended by such notes, by entering the verdict for the plaintiff on the first count of the declaration, and for the defendant on the other counts;" and the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin* in this same *Michaelmas* term, giveth the Court here further to understand and be informed, that before the giving of the said judgment of the Court of our said lord the king now here, that is to say, on *Thursday* the 24th day of *November* in this same term, the following rule or order was made: "Upon reading a rule made in this cause on *Thursday* the 10th day of *November* instant, and on hearing counsel on both sides, it is ordered, that the postes in this cause be amended, by entering the verdict for the plaintiff on the first count of the declaration, and for the defendant on the other counts, without the payment of any costs." And the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin* in the same *Michaelmas* term, also giveth the Court here further to understand and be informed, that after the giving of the said judgment of the said Court of our said lord the king now here, that is to say, on the said *Friday* in fifteen days of *St. Martin* in this same term, the following rule or order was made, in and by the said Court of our said lord the king of the bench aforesaid, as to the roll or record of the proceedings of the said cause; that is to say, "Upon reading a rule made in this cause yesterday, the affidavit of *J. J.*, and the paper writing thereto annexed, it is ordered, that the defendant, upon notice of this rule to be given to him or his attorney, shall shew cause to this Court peremptorily on the morrow, why the judgment-roll in this cause should not be amended and made conformable to the amended postes, the plaintiff by his counsel hereby offering to allow to be deducted the difference (if any), between the costs which have been taxed and allowed in this cause, and the costs upon the postes, as amended, or to pay the said difference forthwith to the defendant or his attorney;" and the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin* in this same *Michaelmas* term, also giveth the Court here to understand and be informed, that after the giving of the said judgment of the said Court of our said lord the king now here, that is to say, on *Saturday* the 26th day of *November* in this same term, the following rule or order was made in and by the said Court of our said lord the king of the bench aforesaid, as to the roll or record of the proceedings of the said cause; that is to say, "Upon reading a rule made in this cause yesterday, the affidavit of *T. S.*, gent., agent for the defendant, the paper writing thereto

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thereto annexed; and on hearing counsel on both sides, it is ordered, that the judgment-roll in this cause be amended, and made conformable to the amended postea, the plaintiff by his counsel hereby offering to allow to be deducted the difference (if any) between the costs which have been taxed and allowed in this cause, and the costs upon the postea as amended; or to pay the said difference forthwith to the defendant or his attorney; and hereupon, on the said *Monday* next after the fifteen days of *St. Martin* in the same *Michaelmas* term, it is certified to the Court of our lord the king now here, by the Justices of our said lord the king of the bench aforesaid, that they have caused the said postea and judgment-roll in this cause to be respectively amended according to the said rules; which said amended roll, as to the postea and subsequent proceedings thereon, is as follows; that is to say, (the Common Pleas roll as amended was then set out upon the record, and by that it appeared that the jury found that the defendant had undertaken and promised, as the plaintiff had in the first count of his declaration complained; and as to the other counts of the declaration, that the defendant did not undertake and promise in manner and form as the plaintiff had in those counts complained against him;) and hereupon the said *G. Richardson*, on the said *Monday* next after fifteen days of *St. Martin*, prays that the Court here will cause the record now here remaining to be amended in like manner, and proceed to give judgment according to the said amendments so ordered to be made, and so made by the Court of our lord the king of the bench; and the said *W. Mellish* admits the truth of the said matter so suggested by the said *G. Richardson*, but alleges, that at the trial of the said issue, the verdict was pronounced by the jury, for the said *G. Richardson* generally, upon all the counts in the declaration, and not for the said *G. Richardson* on the said first count of the declaration, and for the said *W. Mellish* on the other counts; which assertion of the said *W. Mellish* the said *G. Richardson* does not deny, otherwise than that he insists that the said *W. Mellish* cannot be allowed to make such assertion against the record, but is, by the record, estopped from making the same; and the said *W. Mellish* also alleges that the said *Robert Lord Gifford* did not amend the said postea, but declined so to do, and left the amendment thereof to the consideration of the said Court of our said lord the king of the bench; and that the same Court made the several rules for amending the said postea and judgment-roll without the consent of the said *W. Mellish*, which allegations the said *G. Richardson* admits; and the said *W. Mellish* insists, that the Court of our said lord the king now here ought not to proceed to give judgment according to the said amendment, especially, unless the Court here examines into and is furnished with the means of examining into the grounds and foundations of the said amendments; but which the Court here cannot examine into, as it is not furnished with such means, nevertheless on this same *Monday* next after fifteen days of *St. Martin*, because it appears to the Court here, that this Court is bound by law to cause the record now here remaining to be amended according to the

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prayer of the said *G. Richardson*, and ought to give judgment according to the said amendments, without examining into or being furnished with the means of examining into the grounds or foundation thereof, and which the Court here cannot examine into, as it is not furnished with such means : therefore, it is ordered by the Court here, that the record now here remaining be amended according to the prayer of the said *G. Richardson*, and the same being so amended is as follows ; that is to say (the amended postea and judgment were then set out) ; and it is considered that the judgment aforesaid of the Court of our lord the king of the bench, according to the amendment, be, and the same is hereby in all things affirmed.

The Master, Wardens, Assistants, and Fellowship of the Company of Tobacco Pipe Makers of the Cities of LONDON and WESTMINSTER, and Kingdom of ENGLAND and Dominion of WALES, against WOODROFFE.

By charter, the king incorporated the Tobacco Pipe Makers in London and Westminster, England and Wales ; and after naming

DEBT by the plaintiffs to recover from the defendant a fine of 6*l.* 13*s.* 4*d.*, and certain penalties alleged to have been incurred under the bye-laws of the Company of Tobacco Pipe Makers. The declaration set forth a charter of *Charles 2.* to the company, and the

the first master, wardens, and assistants, provided for the future election of officers and the transaction of other corporate business at meetings to be holden in a hall in London, or within three miles thereof, and that the master, wardens, and assistants should there yearly elect out of the assistants four to be wardens of the society ; and it then authorized the master, wardens, and assistants to make bye-laws for the government of the society, and every member thereof, and every person using the art or mystery of making tobacco pipes in London and Westminster, and any other parts or places in England or Wales : Held, that although the charter might be inadequate to bind all the tobacco pipe makers in the kingdom, it was competent to bind such of them as became members of the corporate company. Secondly, that the charter, by fixing the place of meetings to London or Westminster, or within three miles thereof, sufficiently established local limits for the corporations. Thirdly, that a bye-law, which imposed a fine on every master, warden, or assistant who should not attend all courts to be holden, was a valid bye-law. Fourthly, that a bye-law, " that if any person chosen to be warden should refuse to accept the office of warden, he should forfeit to the company 6*l.* 13*s.* 4*d.*," was good, the words any person applying to persons eligible by the terms of the charter to the office of warden. Fifthly, that a bye-law, that every freeman, using or not using the said art, mystery, or trade, should pay yearly to the company 8*s.*, to be paid quarterly, and every journeymen of the company 4*s.* yearly, to be paid quarterly, and that every person refusing should forfeit twice the sum, was bad, inasmuch as it did not appear that any rightful expenditure of the company required such a contribution.

acceptance

acceptance of that charter, by which they were empowered to make bye-laws, under which the said fine and penalties became due, as was alleged; and the plaintiffs claimed on the first count 2*l.* 16*s.*, being twice the amount of fourteen quarterly payments under the fifteenth bye-law; in the subsequent counts, up to the twenty-fifth count inclusive, the sum of 2*s.* in each count, amounting in the whole to 2*l.* 8*s.*, for non-attendances, in pursuance of the fifth bye-law, in consequence of the defendant's refusal to accept the office of warden. Plea, nil debet. At the trial before Lord Tenterden C. J., at the London sittings after Hilary term 1825, a verdict was found for the plaintiffs for the fine and penalties, subject to the opinion of this Court on the following case:

By charter of the 16 *Charles 2.* the king did, among other things, grant and declare that his subjects, the tobacco pipe makers, within his cities of *London* and *Westminster*, and his kingdom of *England*, and dominion of *Wales*, and every of their apprentices whatsoever, when they should have served as apprentices to the said art or trade by the space of seven years, and all and every other person and persons who had served as apprentices to the said trade, or had used the said trade by the space of seven years, and all others which thereafter from time to time should be admitted and made free of the said society in such manner as thereafter was declared and specified, should be, from thenceforth for ever, one fellowship and body corporate and politic in deed and in name, by the name of the Master, Wardens, Assistants, and Fellowship of the Company of Tobacco Pipe Makers in his said cities of *London* and *Westminster*, and his kingdom of *England*, and dominion of *Wales*, and that by the same name they should have

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perpetual succession. The charter then added, that the king granted, among other things, that from thenceforth for ever, there should be one master, four wardens, and fifteen or more assistants, of the said society, to be constituted and chosen in such manner and form as thereafter was expressed and specified. (Then followed the appointment of the first master by name for one year, of the first four wardens by name also for one year, and of the first fifteen assistants by name, for life,) and, further, the king did thereby ordain, that from and after such time as the said first master should have served in the office of master of the said society during the time before limited, then the wardens and assistants, for the time being, or the greater part of them, for that intent or purpose being assembled at or in a meet-house or hall, to be by them for their use purchased within his said city of London, or three miles of the same, should, within convenient time, nominate and elect a fit and sufficient person, who had formerly been one of the wardens of the said society, to be master of the said society, and so the master for ever thereafter to be annually elected to the office of master upon the 25th of March, and so to continue for one whole year then following: and, further, the king granted that the said master, warden, and assistants, or the greater part of them, from and after the 25th of March 1604, should yearly on the 25th of March (if it were not a Sunday, or if Sunday, then the next day after), at the hall or place of meeting and assembly, nominate and elect out of the said assistants four to be wardens of the society, which said wardens should continue wardens until the end of one whole year then next ensuing, and from thence until some other meet persons should be elected and chosen

chosen into the said office as wardens as aforesaid, if the said wardens should so long live, or should not be removed from thence for some just cause as aforesaid; they, the said master and wardens so newly elected, taking oath before the master and wardens then being their last predecessors, or any two or more of them, for the due execution of the said several offices and places; and then that every such master and warden, masters and wardens so from time to time leaving and departing from his and their places of masters and wardens respectively, at the end of his year should instantly become and remain assistant and assistants of the said society in the room of him or them that should be so chosen out of the assistants to be master and wardens of the said society as aforesaid: and, further, the king granted that if any of the said assistants of the said art or mystery should die, or be removed from his or their office or place of assistants for some reasonable cause, that then and so often it should be lawful for the said master, wardens, and assistants, or the greater number of them, to choose and make one or more other meet person or persons of the said society to be assistant or assistants of the same society, to continue in the said office or offices during his or their lives, except they, or any of them, for any reasonable cause, should happen to be removed out of the said office or offices: and further, that it should be lawful for the master, wardens, and assistants for the time being, or the greater part of them, from time to time, to set or impose a reasonable fine and sum of money, not exceeding 10*l*, upon all and every such person and persons as should be at any time thereafter elected to the said several offices of master, warden, and assistants, or any of them as aforesaid, and should refuse to undergo

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dergo and accept the same; and the same to levy by distress of the goods and chattels of the person and persons so refusing as aforesaid, or otherwise by any other lawful ways. The charter then empowered the master, wardens, and assistants, and their successors, to assemble in their hall or place before mentioned, and there to make constitutions, laws, &c. for the rule and government of the master, wardens, assistants, and society, and every member thereof, and in what order or manner the said master, wardens, assistants, and society, and all and every other person or persons using the art or mystery of making tobacco pipes within the cities of *London* and *Westminster*, and any other parts or places within *England* or *Wales*, should demean and behave themselves, as well in all matters touching the said art or mystery, as also in their several offices, functions, mysteries, and businesses touching the said society as aforesaid, and all and singular such pains, penalties, &c. by fines against any offender who should transgress the said constitutions, laws, &c. to be made, to provide, impose, and limit, as to the master, wardens, and assistants of the said society, or the greater part of them, for the time being should seem expedient; all which laws, &c. the king granted and commanded to be obeyed and performed in all things, as the same ought to be, under the reasonable penalties, forfeitures, &c. in the same to be imposed, provided, &c., so as the same laws, statutes, &c., penalties, forfeitures, fines, &c., or any of them, should not be repugnant or contrary to the laws and statutes of *England*, or prejudicial to the customs of the city of *London*.

At the trial it was objected for the defendant, that evidence ought to be given that the charter had been accepted

accepted by a majority of those whom it intended to incorporate, whereupon it having been proved that the defendant had been admitted a member of the company, and had acted as such, and that quarterage and other dues had been received from tobacco pipe makers in different parts of *England* ever since the granting of the charter, the Lord Chief Justice stated that it was not for the defendant to dispute the acceptance of the charter, and his Lordship left it to the jury upon this evidence alone as to the point of acceptance, that it was complete and conclusive evidence against the defendant that the charter had been accepted, and the jury found the fact to be so. And it is for this reason alone stated as a fact in the case as against the defendant, that the tobacco pipe makers of *London* and *Westminster*, and kingdom of *England* and dominion of *Wales*, accepted the charter, and have ever since acted under it.

On the 30th of *August* 1820, at a meeting of the master, wardens, and assistants of the company duly assembled for that purpose at the *Guildhall* of the city of *London*, forty-five bye-laws were duly ordained, established, and declared, which the defendant took an active part with the committee of the company in forming and passing, and signed the same as one of the assistants of the company, together with a petition to the Lord Chancellor; the Lord Chief Justice of the Court of King's Bench, and the Lord Chief Justice of the Court of Common Pleas, to examine, approve, and sign the same. The bye-laws and the petition were signed and approved pursuant to stat. 19 *Hen.* 7. by the Lord Chancellor and the two Chief Justices. (As the decision of the Court applies only to the bye-laws stated in the declaration, it is unnecessary to set out the others.) The fifth bye-law ordered

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ordered that the master, wardens, and assistants of the said company should, upon notice to him or them given, or left at his or their usual place or places of abode, appear at all other courts to be holden for the company at such place of meeting to be appointed as aforesaid, unless hindered by sickness, or some other reasonable cause, to be allowed by the master, wardens, &c. for the time being, or the greater part of them, upon pain of forfeiting for every default the sum of 2s.; and if he should not appear at the hour to be appointed by the master and wardens for that purpose, to pay the sum of 6d. for every default; or if he should leave the court without licence of the master, to pay the sum of 6d. for any time he shall so offend: the said several sums to be paid to the company for the use thereof.

The tenth bye-law ordained, among other things, that if any person who should be chosen to be a warden of the company should refuse to accept the office of warden, or take the oath appointed to be administered to him in that behalf, every person so refusing should forfeit to the company, for the use thereof, 6l. 15s. 4d.

The fifteenth ordained, that as well every freeman and brother of the said company within the cities of *London* and *Westminster*, and any other parts or places within the kingdom of *England* and dominion of *Wales* as limited by the said charter, either using or not using the said art, mystery, or trade of making tobacco pipes, should pay yearly, by the name of quarterage money, to the master and wardens of the company for the time being, to the use of the said corporation, the sum of 8s. yearly, which should be paid quarterly by equal portions; and every journeyman or journeywoman of the said company who should be kept or set on work by or with any member

member or members thereof, should pay 4s. yearly at the four quarterly days aforesaid, by equal portions, to the said company for the use thereof; and the same quarterages should be paid at the said quarterly assemblies in the place of meeting aforesaid; upon condition, that, every person refusing or neglecting to pay his or her quarterage at the said quarterly courts, or to the renter-warden, within the space of ten days after any of the said quarterly meetings, according to the rates aforesaid, should forfeit and pay twice as much as should be at any time in arrear and not paid to the master and wardens for the time being, or some of them.

The defendant was a tobacco pipe maker carrying on business in *Old Street*, and at *Vinegar Yard, Belton Street, Bloomsbury*, both in the county of *Middlesex*. On the 7th *January* 1812, at a court of the company duly holden, he was admitted and sworn into the freedom of the company; since which he had frequently attended the meetings of the company held under the charter and bye-laws. At a court duly holden on the 25th *March* 1813, the defendant was chosen steward of the company, and served that office; and at another court holden in 1814, he was chosen one of the assistants, took the oath required, and paid the freeman's quarterly money then due from him. On the 10th *January* 1815, and at many subsequent courts from that time till *March* 1823, he sat and acted as an assistant, and during those periods took a great interest in the affairs of the company. At a general court duly holden on the 25th *March* 1823, at which the defendant was present, he was duly chosen warden of the company, of which he had notice, but refused to take upon himself that office. Prior to 1820 he had frequently paid the quarterage.

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quarterage money mentioned in the fifteenth bye-law; but from Midsummer 1820 to Christmas 1823, he being all that time a freeman and one of the assistants of the company, neglected to pay the quarterage, the same having been duly demanded of him. The several courts, stated in the report and subsequent counts of the declaration, were duly holden, at which the defendant was summoned to attend, but neglected so to do.

E. Pollock for the plaintiffs. The charter is valid. The circumstance of the company having power to make regulations for the trade throughout *England* and *Wales*, might have furnished an argument against its validity if it had given exclusive privileges tending to narrow or restrain the exercise of the trade. But its tendency is otherwise, for it includes all persons exercising the trade. The *Butchers' Company v. Morey* (a) affords an instance of a charter giving a company powers more extensive. There, the power was given to the Butchers' Company to make bye-laws for the government of all persons exercising the trade of a butcher in *London*, whether they were members of the company or not. It must be taken as against the defendant, after the finding of the jury, that the charter was accepted. Secondly, the bye-laws, as a whole, are valid. The company had authority to make them, and their object is beneficial to the public, and not in contravention of the common or statute law. And assuming that some of them are void, that will not render the others void. The fifth bye-law is clearly good. The company had authority to make

(a) 1 H. BL. 370.

it. It contains a regulation legal in itself, and binding on all the members. The tenth, which imposes a fine on every person refusing office, is a regulation of the same nature. Giving a reasonable construction to the words there used, the word *person* must apply to the persons liable to serve the offices. It appears by the charter that the officers must be chosen out of the members, and the bye-law must be construed with reference to that provision in the charter. The fifteenth bye-law is good as against the members of the company: perhaps it may not be good as against journeymen, though it relates to journeymen of the company. But that part of the bye-law on which the action is brought applies to members of the company, and that is good. The defendant, being a member, is bound by it.

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—
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George contra. The charter is void. Secondly, the whole body of the bye-laws is void. Thirdly, two of those bye-laws on which the action is founded are bad. The effect of the charter is to subject to bye-laws, and expose to fines, all persons who shall carry on the trade or handicraft of a tobacco pipe maker, not in any particular place, but in the cities of *London* and *Westminster*, or in the kingdom of *England* and dominion of *Wales*. First, the acceptance of such a charter would be impracticable; for how could all the tobacco pipe makers in the kingdom be assembled for that purpose? But the crown cannot by its prerogative grant such a power to a corporation; it can only be granted by act of parliament; and a charter which professes to give to a particular company a power to regulate by bye-laws the trade of the whole kingdom, is void, because it is in restraint of the common law right which every subject has

1836.

The Lessee
Tobacco Pipe
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against
Weston.

has to examine every lawful trade, *Quæ Regis de Trade*, (A. 6.) In the same work, *de Franchis*, (B. 23. 345) is laid down, that the king, for the public good, may grant an embargo upon a merchant ship; but that an embargo shall not be allowed if done for the benefit of a private trader or company, and *Chilb. de Re (a)* is cited. Upon the same principle, it would seem that the king cannot by charter grant monopoly for the benefit of a particular company. In *de Franchis*, (B. 23. 345) it is said, that the king may incorporate for the improvement of trade, and there is a reference to *Magna Charta (B.)*; and there the case of the city of *London (b)* is cited for showing the king may, with the cooperation of merchants, incorporate a company of trade. In that case it was resolved, that the custom of *London* "that no person whatever, not being free of the city of *London*, shall keep any shop for putting to sale of any wares by way of retail, or use any trade, occupation, mystery, or handicraft for hire, gain, or sale within the city of *London*, was a good custom; and that a constitution made according to the custom, upon pain of forfeiture of *sh.*, was also good. And as to this first, it was resolved, that there was a difference between such a custom, within a city, &c. and a charter granted to such a city, &c. in each effect; for it is good by way of custom, but not by grant; and, therefore, no corporation made within time of memory can have such privilege, unless it be by act of parliament. Now the Tobacco Pipe Makers' Company cannot be a corporation by prescription; for tobacco was introduced into this country in 1600, within the time of legal memory.

(a) 1 Salk. 38. 5 *Leach*. 363.

(b) 8 Ch. 125 a.

That

That case, therefore, is an authority to show that a charter giving an exclusive right to a particular company to carry on trade within a city, is void. A fortiori, a charter giving a power to a company to make bye-laws, binding all persons who exercise a trade throughout the kingdom, must be void. The very term bye-law implies a law limited to a particular district; *Jacob's Law Dictionary*, tit. *Bye-Law*. The only instance of a corporation like this which is to be found, is the case of the Soap Makers' Company, *Hylar v. Hunting* (a). It appears by that case, that King Charles the First by charter ordained that there should be in England and Wales one society or body corporate of soap makers, and that none, not free of that society, should use that trade without admittance into the society, upon pain to forfeit all the soap they should make. It does not appear, however, that any judgment was given in that case. But, secondly, this charter is void, because the corporation is not constituted of any particular place, and that is essential to every corporation. The case of *Stutton's Hospital* (b), *Roll's Abr.* tit. *Corporation*, (D.)

Then, as to the bye-laws, it is not contended that all the bye-laws are bad because one is bad; but it is fair to look to the object for which the bye-laws were made, and if it appears that the general object of most of the bye-laws was to extract money from all persons, whether they be members of the corporation or not, who exercise the trade, they were illegal, and if the major part be void on that ground, the whole must be taken to be void. (He then proceeded to show that the object of many of the bye-laws not set out in the report was as above stated; but

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Makers' Co.
against
Wentworth.

(a) *Hardr. 35.*

(b) 10 Ch. 574.

1828.

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as the Court, in their judgment, took no notice of these bye-laws, it has been deemed unnecessary to state the argument further upon that point.) It may be conceded, that there is no objection to the fifth bye-law per se. The tenth bye-law is void: *The Mayor of Oxford v. Wildgoose*(a) is in point. There the bye-law was, "that if any person should be duly elected chamberlain and refuse, he should forfeit a certain sum to the mayor, &c. And a bye-law to elect aliquam personam was held to be void, because thereby they might elect any stranger to be their chamberlain." That case shows that the tenth bye-law is bad, and if it be bad because it extends to all persons, it will not be good as to those to whom it is applicable; because a bye-law being cap- ture, if it be unreasonable in any particular, shall be void for the whole, *Com. Dig. tit. Bye-Law, (C. 7.)* The fif- teenth bye-law imposes a payment on members of the corporation, whether they use the trade or not. It does not state for what purpose the money is to be raised, or that it is necessary for any purpose for which the com- pany might by law raise money. That being so, this bye-law is at all events void.

Cur. adv. vult.

Lord TENTERDEN C. J. in *Trinity* term 1828, de- livered the judgment of the Court.

This was an action upon three bye-laws, the fifth, tenth, and fifteenth, made by the Tobacco Pipe Makers' Company, in *August* 1820. The company was incor- porated by charter of the 15 *Car. 2.*, and has a master and four wardens, who are chosen annually, and fifteen

(a) 3 *Levinz.* 293.

assistants.

assistants. The fifth bye-law imposes a penalty of 2s. upon the master, or any warden or assistant who does not personally appear at each court. The tenth bye-law imposes a fine of 6*l.* 1*9s.* 4*d.* upon any person chosen warden who does not accept the office and take the oath; and the 15th bye-law requires every freeman and brother of the company, whether he used the trade or not, to pay 2s. per quarter for the use of the company. The action was brought for 2*l.* 8*s.* under the fifth bye-law; 6*l.* 1*9s.* 4*d.* under the tenth, and 2*l.* 16*s.* under the fifteenth; and the questions were, Whether the charter was valid, and the bye-laws, or any of them, good?

The charter professed to incorporate the tobacco pipe makers in *London* and *Westminster, England* and *Wales*, and their apprentices, when they should have served seven years; and every person who had for seven years either served as apprentice to the trade, or used the trade, and all others which thereafter should be admitted and made free of the company; and, after naming the first master, wardens, and assistants, provided for the election of future masters, wardens, and assistants, in a meet-house or hall to be by them for their use purchased or provided in *London*, or within three miles thereof. The charter also gave the master, wardens, and assistants power to assemble in such hall or place, and make bye-laws, for the rule and government of the master, wardens, and assistants, and society, and every member thereof, and every person using the art or mystery of making tobacco pipes in *London* or *Westminster*, or any other parts of *England* or *Wales*. Two objections were made to this charter; one, that it was to bind all the tobacco pipe makers in the kingdom, which nothing short of an act of parliament could do;

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WOODKOTFE.

1828.

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against
Woodroffe.

and the other, that it was confined to no part in particular of the kingdom, and that every corporation ought to be of some place. But we think it an answer to the first of these objections, that though the charter be inadequate to bind all the tobacco pipe makers in the kingdom, it may be and is competent to bind such of them as think fit to become members of the company; and we think it an answer to the second objection, that this charter, by fixing the place of meeting for the company to *London* or *Westminster*, or within three miles thereof, establishes such local limits as are requisite upon such a charter.

The next question then is, upon the validity of the bye-laws. The fifth, is to compel an attendance at corporate meetings (*a*); the tenth, to compel an acceptance of a corporate office (*b*); and to the subject matter of these bye-laws no legal exception can be made. Attendance at corporate assemblies, and acceptance of a corporate office, is a duty each member owes to the corporation to which he belongs. Is there any objection, then, to the manner in which these bye-laws are worded? The fifth is so framed as to be free from exception; it requires the attendance of master, wardens, and assistants, by those specific names. The tenth is more generally worded. "If any person, who shall be chosen a warden, shall refuse to accept the office and take the oath, he shall forfeit 6*l.* 13*s.* 4*d.*" And it may be said, that the word *person* is indefinite, and would include persons not properly eligible to the office. And this very objection was certainly allowed in *The*

(*a*) See *Lutw.* 1320. *Ld. Raym.* 113.

(*b*) See *Lutw.* 402. *Ld. Raym.* 496. 2 *Lev.* 282.

Mayor of Oxford v. Wildgoose (a). That case, however, is not to be found in any contemporaneous reporter; it does not appear to have been much discussed or considered; and we think it cannot be supported. In that case, as well as this, we think the condition of eligibility is from the subject matter necessarily implied, and that the word *person* must be considered as confined to *eligible* persons. The only remaining question is, as to the quarterages; and it seems to us, that as the amount of these contributions is not confined to what the proper demands of the company may require, but is uniformly the same, let the company's expenditure be little or great, and as there is no statement from which we can collect that the rightful expenditure of the company requires any such contribution, this, which is in the nature of a tax upon the company, cannot be supported. We are aware of the *Innholders'* case (b), which is reported in Mr. Ford's MSS. vol. v., by the name of *The Innholders' Company v. Harrison*, where a bye-law that every innholder, being a brother of the company, should pay 2s. per quarter, to be applied to *particular purposes for the benefit of the company*, was held good; but the purposes to which those payments were to be applied might be commensurate with those payments, and might, on that account, remove all objection to the amount of those payments; whereas here, there is nothing to shew that a quarterage to such an extent, or to any extent, is necessary for the company; and, for any thing which appears to the contrary, the company may have sufficient funds of its own from other sources, for all the purposes of the company. We are, therefore, of opinion,

1828.

The London
Tobacco Pipe
Makers' Co.
against
Woodroffe.

(a) 3 Lev. 293.

(b) 1 Will. 281.

CASES IN HILARY TERM.

1828. that the verdict should stand for the 2*l*. 8*s*. and the
6*l*. 13*s*. 4*d*., and should be annulled as to the 2*l*. 16*s*.

The London
Tobacco Pipe
Makers' Co.

Judgment for the plaintiff. (a)

against
WOODROFFE.

(a) This case was argued at the sitting in banc. after *Michaelmas* term, 1825, and judgment was delivered in *Trinity* term, 1826, but the papers having been mislaid, the editors were unable to publish it at an earlier period.

END OF HILARY TERM.

AN

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1. The agent for the grantee of several annuities delivered him four accounts in the course of eighteen months, and gave him credit for all the half-yearly instalments of the several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, and paid the balance of the accounts as if they had been received, and in the later accounts never brought forward those sums, nor intimated that he expected them to be repaid:

paid: Held, upon a bill of exceptions, that upon this evidence the jury were properly told by the judge that they might infer an agreement whereby the agent made himself personally responsible for the payments of those annuity instalments, in default of payment by the grantors. *Shaw and Others, Assignees of Howard and Gibbs, v. Woodcock*, T. 8 G. 4.

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2. Where a party who by writing obligatory (without any penal sum) had bound himself to pay to A. B. an annuity of 20l. a year for her life, devised his estates to trustees upon certain trusts, until his son should attain the age of twenty-one years: Held, that the estate of the trustees ceased upon the death of the son under the age of twenty-one, all the purposes of the trust being then at an end; and that the trustees were only liable to pay to A. B. such arrears of the annuity as became due before the son's death. *Morant v. Gough and Another*, T. 8 G. 4. 206

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See COUNTY RATE. HIGHWAY, 6.

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2. By a local act certain trustees of roads were authorized to make an order for stopping up part of certain old highways, and a right of

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3. A notice of appeal against overseer's accounts, merely stating that the party intended to try his appeal against the accounts on the grounds and for the reasons thereafter set forth, and then specifying the items against which he intended to appeal, and the objection which he intended to make to each item, was held to be sufficient, although it was not stated that the party intending to appeal was a rated inhabitant of the parish, or a party aggrieved. *The King v. The Justices of Somersetshire*, H. 8 & 9 G. 4. 681 a. (a).
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ARBITREMENT.

See AWARD. BANKRUPT, 1.

1. A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was referred to a barrister, and the costs of the cause were to be in his

his discretion. He found that the plaintiffs were entitled to recover, and ordered the defendants to pay the costs of the cause: Held, that the plaintiffs were not entitled to the costs of the first trial. *Ridgby and Others, Assignees, v. Okell and Others, T. 8 G. 4.* Page 57

2. Where an award directed that one of the two parties to the submission should pay the expenses of the reference, and that the other should repay them on demand; and the former having paid them, made an affidavit of debt against the other party, alleging such payment, but not stating any demand of repayment: Held, that this was not sufficient. *Driver v. Hood, M. 8 G. 4.* 494

3. Where a cause and all matters in difference were referred at Nisi Prius to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter; and between the time of making the order of reference and taxing costs, and signing judgment, the plaintiff became bankrupt: Held, that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged as to that debt by his certificate. *Haswell v. Thorogood, H. 8 & 9 G. 4.* 705

ARREST.

1. By the 12 G. 1. c. 29. s. 2. it is provided that before arrest by an inferior court, an affidavit of debt shall be made before the officer who issues the process or his deputy: Held, that the deputy must be appointed for issuing process, and not merely for taking affidavits. *Rogers v. Jones, T. 8 G. 4.* 86

2. An Irish peer cannot be arrested for a debt. *Coates and Another, Assignees, v. Lord Hawarden, M. 8 G. 4.* Page 388

ASSUMPSIT.

1. By the statute 3 G. 4. c. 46. the Court of quarter sessions are empowered to discharge a forfeited recognizance in those cases only where the party has been committed to gaol, or has given security to appear at the sessions; and therefore where a party whose recognizance had become forfeited for not appearing to an indictment, and against whom process had issued, paid to the sheriff the sum mentioned in the recognizance in order to prevent a sale of his goods, and the justices at sessions afterwards by an order mitigated the recognizance to a small sum, and directed the sheriff to discharge the residue from the recognizance; it was held, that such order was void, and that the party was not entitled to recover from the sheriff the sum which the justices had ordered to be discharged. *Haynes v. Hayton, Esq., T. 8 G. 4.* 293

2. An action at law for a distributive share of an intestate's property cannot be maintained against the administrator, nor against his executor, although he may have expressly promised to pay. *Jones v. Panner, Executor, M. 8 G. 4.* 542

ATTORNEY.

See JOINT STOCK COMPANY, 2.

1. The statute 1 G. 4. c. 119. s. 11. enacts that no suit in law be proceeded in further than an arrest on mesne process by any assignee of an insolvent's estate without the consent of creditors and appro-

approbation of one of the commissioners of the insolvent court: Held, in an action brought by an attorney to recover his bill of costs incurred in an action at the suit of such an assignee, that it was incumbent on the attorney to prove that the consent of creditors and the approbation of one of the commissioners of the insolvent court had been obtained, or at all events that he had informed his client that such consent was necessary. *Allison, Genl., one, &c. v. Rayner*, M. 8 G. 4. Page 441

2. An attorney, upon receiving the amount of his bill, is bound to deliver up to his client, not only original deeds, &c. belonging to him, but also the drafts and copies. *Ex parte E. Horsfall*, M. 8 G. 4. 528
3. By custom in a corporate town, all persons having served an apprenticeship for seven years to a free burgess, carrying on trade there, were entitled to be admitted to the office of free burgess: Held, that a person who had served under articles of clerkship to an attorney, a free burgess of the borough, and residing within the same, was not entitled to be admitted to his freedom. *The King v. The Mayor, &c., of Doncaster*, H. 8 & 9 G. 4. 630
4. An attorney suing by *latitat*, and not by attachment of privilege, loses his right to retain the venue in *Middlesex*. *Mounsey v. Watson*, H. 8 & 9 G. 4. 683

AWARD.

See ARBITREMENT.

In debt on an award, the execution of the submission by all the parties must be proved. *Ferrer v. Owen*, M. 8 G. 4. 427

BAIL.

See PRACTICE, 6. 10. 14. 16, 17.

BANKRUPT.

1. Where a commission of bankrupt was sued out on the petition of A. B., founded on an act of bankruptcy in December, and it appeared that, in the preceding October, the bankrupt by a deed to which A. B. was a party assigned all his property. Held, that the assignees (although A. B. was not one of them), could not avail themselves of this deed as an act of bankruptcy, in order to recover money subsequently paid by the bankrupt, inasmuch as the creditors, represented by the assignees, derived all their rights under the commission from the petitioning creditor, who was a party to the deed.

The money sought to be recovered had been deposited by the bankrupt in the hands of an arbitrator, who was to decide to whom it belonged. The arbitrator, before the commission issued and without knowledge of any act of bankruptcy having been committed, paid the money over to the person whom he thought entitled to receive it: Held, that the assignees could not recover it from the arbitrator. *Tope and Another, Assignees, v. Hockin, Gent., One, &c.*, T. 8 G. 4. Page 101

2. The assignees of a bankrupt, having once affirmed the acts of a person who wrongfully sold the property of the bankrupt, cannot afterwards treat him as a wrongdoer and maintain trover. *Brewer and Another, Assignees, v. Sparrow*, T. 8 G. 4. 810
3. The sheriff having, under a fieri facias, issued at the suit of a judgment

ment creditor, seized the goods of a bankrupt which the assignees claimed, the Court stayed the return of the fieri facias until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution creditor for seizing the goods, which consisted of the stock on a farm which had belonged to the bankrupt. On the issuing of the commission the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff under the fieri facias. The Court refused to stay the proceedings in the action of trespass. *Bernasconi and Others v. Fairbrother and Another, Sheriffs of Middlesex and Another, T. 8 G. 4.*

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4. Where a verdict in trover was obtained in vacation against a trader, who, after the first day of next term, but before final judgment was signed, became bankrupt: Held, that final judgment signed afterwards during the same term related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate. *Greenway and Another v. Fisher, M. 8 G. 4.*

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5. Where a trader in embarrassed circumstances gave a bill of sale of part of his property to a particular creditor: Held, that upon a question whether this was an act of bankruptcy within the 6 G. 4. c. 16. s. 3., it was properly left to the jury to say, whether it was a voluntary deed and given

in contemplation of bankruptcy. *Gibbins and Another, Assignees, v. Phillips, M. 8 G. 4. Page 529*

6. Where a party examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy, but not that it was a subsisting debt: Held, that this was not evidence sufficient to support a count on an account stated with the assignees. Query, whether an admission obtained by such compulsory examination can be used as evidence in such an action? *Tucker and Another, Assignees, v. Barrow, H. 8 & 9 G. 4.*

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7. Where a party, brought before commissioners of bankrupt, and examined by them with a view to ascertain whether the bankruptcy had been concerted between him and the bankrupt, and how the stock of the latter had been disposed of, was asked with what intention he believed the bankrupt had come to him on a certain day before the docket was struck? to which he answered, that he did not know the bankrupt's intention, and did not know what to say as to his belief: Held, that the question was not material, and that, therefore, although the answer might not be satisfactory, the commissioners had not authority to commit the party. *Ex parte Charles Baxter, H. 8 & 9 G. 4.*

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8. A second commission issued against a trader, before a former commission has been disposed of, is a nullity; and where a bankrupt obtained his certificate under a second commission, issued under such circumstances: Held, that he was not entitled to be discharged out of custody, although

though the debt for which he was detained was contracted before the issuing of that commission. *Till and Another, Assignees, v. Wilson*, H. 8 & 9 G. 4.

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9. Where a cause and all matters in difference were referred at Nisi Prius to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter, and between the time of making the order of reference, and taxing costs and signing judgment, the plaintiff became bankrupt: Held, that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged as to that debt by his certificate. *Haswell v. Thorogood*, H. 8 & 9 G. 4.

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BILL OF EXCHANGE.

1. The holder of a bill of exchange cannot, by the custom of merchants, insist upon payment by the acceptor, without producing and offering to deliver up the bill; and, therefore, it was held that the indorsee of a bill having lost it, could not, in an action at law, recover the amount from the acceptor, although the loss was after the bill became due, and the indorsee offered an indemnity. *Hansard v. Robinson*, T. 8 G. 4.

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2. A. was employed as store-keeper by B. and C. who were joint adventurers in a mine, and he was authorised to draw bills on B. for money laid out on account of the mining company. The bills were discounted by a banker, and the payment of them was guaranteed to him by B. and C. B. having been arrested, A., in order to

provide funds to procure B.'s discharge, drew on B. a bill purporting to be on account of the mining company. The banker discounted the bill, and paid the amount to B. C. was afterwards compelled to take up the same in consequence of his guaranty. In an action brought by A. against B. and C. for his salary, it was held that C. could not set off the amount of the bill. *Jones v. Fleming and Jones*, T. 8 G. 4.

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3. A. B., who carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney, by the first of which, authority was given, for him and in his name, and to his use, to do certain specific acts, (and amongst others to indorse bills, &c.) and generally to act for him, as he might do if he were present; and by the second, authority was given, "for him and on his behalf, to accept bills drawn on him by his agents or correspondents." C. D., one of A. B.'s partners, (and who acted as his agent,) in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in A. B.'s name by procuration. In an action against A. B. by the indorsee of the bill; Held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the powers applied only to A. B.'s individual, and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that C. D. did not draw the bill in question as agent, but as partner; and, lastly, that the general words in

(the

the powers of attorney were not to be construed at large, but as giving general powers, for the carrying into effect the special purposes for which they were given. *Attwood and Others v. Munnings*, T. 8 G. 4. Page 278

4. A customer deposited a sum of money with a banker, and received a note, by which the banker promised to pay the principal at ten days sight, with three per cent. interest to the day of acceptance. The banker paid interest on the note, but, at the same time, told the customer that he would not in future pay more than two and a half per cent., and, in his presence, altered the terms of the note, by striking out three and inserting two and a half. Held, first, that the word "acceptance" meant sight, and that it need not be left with the maker for acceptance; secondly, that the payment of interest was evidence to shew that a principal sum was due, and that the note was admissible in evidence, to shew the terms on which the deposit was made. *Sutton v. Toomer*, M. 8 G. 4. 416

5. Where a bill of exchange, payable after sight, having been presented for acceptance and refused, and duly protested, was eight days afterwards accepted by a third person for the honour of the drawer, and when at maturity, according to that acceptance, was presented for payment, both to the drawee and the acceptor for honour. Held, in actions against the latter and the drawer, that these presentments for payment were made at a proper time. But it was held necessary that presentment to the drawee for payment should be averred in the declaration; and for want of such averment judgment was arrested. *Williams v. Germaine*, M. 8 G. 4. 468

6. Where A. B. agreed to take a farm, and pay C., the former occupier, for certain articles, by bills at three months, and C. afterwards, without the knowledge or consent of A., took from B. bills for the amount, payable at six and twelve months, accepted by himself in his own name and A.'s. Held, that the latter could not be sued on the bills. *Greenslade v. Dower and Colman*, H. 8 & 9 G. 4. Page 635

BOND.

See ANNUITY, 2.

An overseer has not, by virtue of his office, any authority to borrow money, and in an action against a surety, on a bond conditioned for the overseer's faithfully accounting for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer and applied by him to parochial purposes. *Leigh v. Taylor*, M. 8 G. 4. 491

BROKER.

See PRINCIPAL AND AGENT.

In an action against a sworn broker of the city of London, for negligence in making a contract, the Court will, on motion, compel him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract. *Browning and Another v. Aylwin and Another*, T. 8 G. 4. 204

BYE LAW.

See CORPORATION, 6.

CANAL ACT.

By a canal act the company of proprietors were authorised to make the canal, and to do all other acts which they might think necessary

cessary and convenient for the making, improving, and using the canal; and the profit of the company, on the money expended in making and completing the navigation was not to exceed 8 per cent. per annum; and in order to ascertain the clear amount of the profits of the navigation, the company were required to keep an account of the money laid out in making the canal, and of all charges incurred before the canal was completed; and also to make out an annual account, balanced to the 29th of September, of the rates, and of the charges attending the supporting, maintaining, and using the said navigation, and these accounts were to be laid before the justices at quarter sessions, and they were to reduce the rates whenever the clear profits of the navigation exceeded 8 per cent. upon the money laid out: Held, that the company were authorised to widen and deepen the canal, after it had been once completed, (that being beneficial to the public,) and that the charge of such widening and deepening was a charge attending the using of the canal. *The King v. The Justices of Glamorganshire, H. 8 & 9 G. 4.* Page 722

CHARTER.

See CORPORATION, 2. 5, 6.

COMMITMENT.

A commitment of an insane person, under the 39 & 40 G. 3. c. 94. s. 3., is not a commitment in execution, and is not, therefore, to be construed with the same strictness; and, therefore, a warrant stating that *A. B.* had been discovered and apprehended under

COMMON.

circumstances that denoted a derangement of mind, and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, to wit, an assault, and that the said *A. B.* being brought before the justice, he committed him, was held to be sufficient, although it did not state the name of the person whom the prisoner intended to assault; and it did not appear that the committing magistrate received any evidence on oath. *The King v. Gourlay, H. 8 & 9 G. 4.* Page 669

COMMON.

1. Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c. and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of *C.*, and that a certain messuage and four acres of land was parcel, and a customary tenement of that manor, and that there is and from time whereof, &c. there hath been a custom within the manor, that the customary tenant of that tenement shall have common of pasture upon the plaintiff's close. That *J. S.* being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c. and put his cattle in, and because the hedges and fences had been improperly erected, defendant threw them down. The plaintiff in his replication took issue upon the custom, and new assigned that the defendant entered for other purposes than those mentioned in the plea: Held, first, that upon the issue joined

joined upon the replication, the plaintiff was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the locus in quo under such custom, and that it was not necessary that that custom should be specially replied.

Held, secondly, that a custom for the lord of a manor to inclose the waste without limit or restriction, being inconsistent with the rights of the commoners, was bad in point of law, but that a custom to inclose (even as against common of turbary) parcels of the waste, leaving a sufficiency of common was good, and that it lay on the lord, or his grantee, to shew that a sufficiency of common was left.

When the lord or his grantee erects fences upon the common, the commoner may, by law, destroy the fences, and, therefore, the fact of the defendant's having entered upon the plaintiff's close, and thrown down the whole of the fences which he had erected, when they might have entered upon the close without throwing down any part of the fences, was held not to be evidence that they entered for other purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plaintiff on the new assignment. *Arlett v. Ellis and Others*, T. 8 G. 4. Page 346

CONVICTION.

Where in trespass against two magistrates for breaking and entering the plaintiff's close in the parish of A., and seizing his sheep, it appeared that the defendants upon the complaint of the surveyor of the highways

appointed for the whole parish, convicted the plaintiff of neglecting to do statute-duty, and issued a warrant to levy the penalty under which the act complained of was done: Held, that the conviction being good upon the face of it, was a sufficient defence, and that the plaintiff could not in this action try the question whether the land which he occupied was exempt from the burthen of repairing the roads in other parts of the parish.

The surveyor called upon the plaintiff to do certain statute-duty, or compound for it: the conviction stated that he was an occupier of land in the parish, and had neglected to do the work, but did not notice the composition: Held, that it was unnecessary to do so, or to state that the plaintiff kept a team, for that if he did not keep a team or had compounded for the statute duty, that was matter of defence which ought to have been urged by him in answer to the complaint. *Fawcett v. Fowles and Another*, M. 8 G. 4. Page 394

COPYHOLDER.

The presumption is, that waste land which adjoins to a road, belongs to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor. *Doe on the demises of Pring and Another v. Pearsey*, T. 8 G. 4. 304

CORPORATION.

1. By a local act for the relief of the poor, certain commissioners were enabled to make rates upon all and every person or persons who held, occupied, or possessed land in the parish: it was held, that

that a corporation was liable to be rated, although by a clause giving an appeal to the quarter sessions to any party aggrieved, such party was bound to enter into a recognisance.

The act of parliament required that before any action should be brought to recover any rates, there should be a personal demand of the same, or a demand in writing left at the place of abode of the persons charged, or on the premises charged: Held, by *Bayley J.*, that a demand made at a meeting of the corporate body duly convened was sufficient; and, by *Littledale J.*, that a demand fixed on the premises charged under the rate was sufficient. *Cortis v. The Proprietors of the Kent Water Works*, T. 8 G. 4.

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2. By charter of the 10 Jac. 1. reciting, that the borough of *D.* was an ancient borough, and that the mayor and burgesses time out of mind had enjoyed divers franchises, the king confirmed to the mayor and burgesses all privileges, &c. and granted to the mayor, burgesses, and their successors, that the mayor and town clerk, together with thirty-six burgesses, being the common council, or the greater part of them, should nominate one of the number of twelve chief burgesses *counsellors* to be mayor; and it further granted to the mayor, town-clerk, and thirty-six chief burgesses, the power to elect all officers; and also of taking all *free burgesses* into the borough. It then granted to the mayor and chief burgesses, being *counsellors*, and the common council, a power of imposing fines; and that the mayor and burgesses, and their successors, should hold within the borough a court of

recorder before the mayor, town-clerk, and chief burgesses, being *counsellors*; and that all manner of pleas should be determined before the mayor, town-clerk, and chief burgesses, being *counsellors*; and that the mayor, town-clerk, and one of the chief burgesses, *counsellors* (to be chosen by the mayor, town-clerk, and common council), should be justices of the peace within the borough. By a subsequent charter reciting the former, King Charles the First confirmed the same and granted, *inter alia*, that the mayor and the recorder, and the chief burgesses, being the common council for the time being (of which chief burgesses, some were known by the name of *chief burgesses counsellors*), should have the power to elect one of the aforesaid chief burgesses and *counsellors* to be mayor; and that the mayor and recorder, and chief burgesses of the common council of the borough, should have the power to elect all officers; and, also, of taking thereafter all free burgesses into the number of free burgesses: Held, that by these charters, (there being no evidence of usage prior to the granting of the charter of Jac. 1.) the twelve burgesses *counsellors* did not form an integral part of this corporation for the purpose of electing free burgesses; and that the right of electing free burgesses was in the mayor, recorder, and the thirty-six chief burgesses, or the major part of them, and consequently that to make a good election of a free burgess, it was sufficient if there were present the mayor, recorder, and a majority of the thirty-six chief burgesses. *The King v. Headley, and Others*, M. 2 G. 4. Page 496

2. By

2. By custom in a corporate town, all persons having served an apprenticeship for seven years to a free burgess carrying on trade there; were entitled to be admitted to the office of free burgess: Held, that a person who had served under articles of clerkship to an attorney, a free burgess of the borough, and residing within the same, was not entitled to be admitted to his freedom. *The King v. The Mayor, &c. of Doncaster*, 11 G. 2 96. 4. Page 630

3. Information for usurping the office of burgess of the borough of S. Plea, that the burgesses were a body corporate by prescription as well as by charter, and that the common council, or the major part of them, being duly assembled as such common council for such purpose within the borough from time to time, and as often as it had seemed fit and convenient to them; had elected so many persons to be burgesses, as to them seemed fit. The plea then (after setting out a charter, by which the king granted that there should be a mayor, ten aldermen, and ten capital burgesses; and that they should be the common council for all things touching the government of the borough), stated that from thenceforth there had been, and still were within the borough a mayor, ten aldermen, and ten capital burgesses, and an indefinite number of burgesses and a common council; that on, &c. the then mayor and divers, to wit, nine of the aldermen of the borough, being the major part of the aldermen, and nine of the capital burgesses, being the major part of such ten capital burgesses so granted by the charter, being the major part of the common council of the borough

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for the time being duly assembled and met together as such common council, for the purpose of electing a burgess; and being so assembled, it seemed fit to them to elect, and they did elect the defendant to be a burgess. Replication, that notice of the purpose for which the supposed assembly of the common council was to be held, was not at any time before the said assembly was held, given to the aldermen or capital burgesses of the borough, or any or either of them: Held, upon demurrer, that the replication was bad, because it assumed as a general proposition of law, that there could not be any lawful assembly for the purpose of electing a burgess, without previous notice of the purpose of the meeting having been given to every member of each select body of the common council; whereas, if all the members of such select body were present at and concurred in the election, such notice would have been unnecessary. *Rex v. Sir G. Chetwynd, Bart.*, 11 G. 2 9 G. 4.

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5. Where a new charter was granted to an old corporation, the mayor and burgesses of S., whereby it was granted that there should be certain definite bodies, and an indefinite body of burgesses; and the definite bodies, and a majority of the burgesses, signified their desire to accept the charter, either by acting under it or by a written declaration of their assent: Held, that this was a valid acceptance.

Quere, whether it was necessary that the charter should be accepted by a majority of the burgesses? *The King v. Hughes*, 11 G. 2 9 G. 4.

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6. By charter, the king incorporated

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rated the Tobacco Pipe Maker's in London and Westminster, England and Wales; and after naming the first master, wardens, and assistants, provided for the future election of officers, and the transaction of other corporate business at meetings to be holden in a hall in London, or within three miles thereof, and that the master, wardens, and assistants should there yearly elect out of the assistants four to be wardens of the society; and it then authorized the master, wardens, and assistants to make bye-laws for the government of the society, and every member thereof, and every person using the art or mystery of making tobacco pipes in London and Westminster, and any other part or places in England or Wales: Held, that although the charter might be inadequate to bind all the tobacco pipe makers in the kingdom, it was competent to bind such of them as became members of the corporate company. Secondly, that the charter, by fixing the place of meeting to London or Westminster, or within three miles thereof, sufficiently established local limits for the corporation. Thirdly, that a bye-law, which imposed a fine on every master, warden, or assistant who should not attend all courts to be holden, was a valid bye-law. Fourthly, that a bye-law, "that if any person chosen to be warden should refuse to accept the office of warden, he should forfeit to the company 6*l.* 1*s.* 4*d.*," was good, the words any person applying to persons eligible by the terms of the charter to the office of warden. Fifthly, that a bye-law, that every freeman, using or not using the said art, mystery, or trade, should pay yearly to the

company 8*s.*, to be paid quarterly, and every journeyman of the company 4*s.* yearly, to be paid quarterly, and that every person refusing should forfeit twice the sum; was bad, inasmuch as it did not appear that any rightful expenditure of the company required such a contribution. *The Master, &c. of the London, &c. Tobacco Pipe Makers' Company v. Woodroffe*, H. 8 & 9 G. 4. Page 838

COSTS.

See BANKRUPT, 9.

1. A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was referred to a barrister, and the costs of the cause were to be in his discretion. He found, that the plaintiffs were entitled to recover, and ordered the defendants to pay the costs of the cause: Held, that the plaintiffs were not entitled to the costs of the first trial. *Rigby and Others, Assignees, v. Okell and Others*, T. 8 G. 4. 57
2. The plaintiff, in an action on the statute 9 Anne, c. 14. s. 2. recovered treble the value of money lost at play; the loser not having sued within the time prescribed by the statute, a writ of error was brought by the defendant, and judgment was affirmed without costs: Held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs. *Willan v. Taylor*, T. 8 G. 4. 111
3. In an action for mesne profits, the plaintiff may recover, by way of damages, costs incurred by him in a court of error in reversing a judgment in ejectment obtained by the defendant. *Nowell v. Roake*, M. 8 G. 4. 404

COUNTY RATE.

See APPEAL, 1. POOR RATE, 5.

Where a county rate was made under a local act, 54 G. 3. c. 103., giving a certain right of appeal: Held, that nevertheless a party aggrieved had the larger right of appeal given by the 55 G. 3. c. 51. s. 14., which applies to all acts relating to county rates theretofore passed, whether local or general. *The King v. The Justices of Buckinghamshire*, T. 8 G. 4. Page 3

COVENANT.

See LANDLORD AND TENANT, 2. 5, 6.

CUSTOM.

See COMMON.

A custom, that there shall be a select vestry of an indefinite number of persons continued by election of new members made by itself, and not by the parishioners, is valid in law.

Semble, That it must be part of such custom that there should always be a reasonable number, and that the reasonableness of the number must be decided with reference to long-established usage, and to the population of the parish; such a custom having existed from time immemorial in a parish.

In the year 1662, by a faculty granted by the Bishop of London, forty-nine persons, together with the vicar and churchwardens, were named as the select vestry; and that number was to be kept up by elections, to be made by ten at least of those forty-nine, together with the vicar and churchwardens. In

the year 1673 this number of ten was, by another faculty, reduced to seven, and these faculties were acted upon ever afterwards. Ten out of the fourteen vestrymen, exclusive of the vicar and churchwardens, who were present at the vestry helden next before the promulgation of the first faculty, were part of the forty-nine named in that faculty: Held, that as the vestry appointed by the faculty, and since continued, was not inconsistent with the vestry previously existing by the custom, the custom was not destroyed by the parish having accepted the faculty, and acted upon it ever since, the faculty not being binding in law, and the vestry having power at any time to depart from its directions. *Golding and Others v. Fenn*, H. 8 & 9 G. 4.

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DAMAGES.

See COSTS, 3.

DEED.

1. Where the owner of certain lands, by deed, describing them as in the possession of himself and A. B., granted, assigned, transferred, and set over, directed, limited, and appointed the same to C. D. for life, but no livery of seisin was made: Held, that the deed operated as a valid grant of the reversion of that part of the premises in the occupation of A. B. *Doe dem. Were v. Cole*, T. 8 G. 4.

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2. A. kept cash with K. and Co., bankers, who held securities for any balance which might become due to them, either for cash advanced to A. or on bills of exchange drawn, accepted, or

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indorsed

indorsed by him. Bills of exchange, accepted by *A.* for the accommodation of *E. H. and Co.*, were deposited in the hands of *K. and Co.* by *M.*, an indorsee, as security for his promissory notes. *A.* became bankrupt, and *E. H. and Co.* entered into a deed of composition with the several creditors, (the assignees of *A.*, as well as *K. and Co.*, being parties to the deed). The deed recited that *E. H. and Co.* had become indebted to various persons, and that several of the creditors of the copartnership were holders of bills of exchange, as securities for their debts owing to them by the said copartnership, which were drawn by or on, or accepted or indorsed by *A.*, and that the provisions proposed to be made should be accepted by the creditors of the copartnership in full satisfaction of their debts, as well against *E. H. and Co.* as against the estate of *A.*, in respect of the said bills of exchange drawn, accepted, or indorsed by them. By a clause in the deed, the creditors expressly released to *E. H. and Co.*, and to two of his sureties therein named (but not to *A.*), all bills of exchange, and covenanted to deliver up into the hands of the trustees (named in the deed) all such bills of exchange drawn, accepted, or indorsed by the copartnership of *E. H. and Co.*, or by *A.*, and all such other bills of exchange as they, the respective creditors, parties thereto, then held for the several debts due and owing to them respectively from the said copartnership of *E. H. and Co.* *K. and Co.*, in pursuance of the deed, delivered up to the trustees named in the deed the bills of exchange drawn by *E. H. and Co.*, accepted for their accom-

modation by *A.*; and *E. H. and Co.*, in settling accounts with the assignees of *A.*, delivered the bills to them. The claims which *K. and Co.* had on *A.*'s estate, for cash advanced to him, were satisfied out of the proceeds of the securities deposited by him in their hands, and there remained in their hands a surplus after satisfying those claims: Held, that the composition-deed did not extinguish the debt due and owing from *A.* to *K. and Co.* upon the bills, although *E. H. and Co.* were released, and therefore, that *K. and Co.* might retain, in satisfaction of their claim against *A.* upon those bills, the surplus of the proceeds of the securities which remained in their hands after satisfying the balance due to them for cash advanced. *Malby and Another, Assignees, v. Carstairs and Others*, *H. 8 & 9 G. 4.*

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DEVISE.

1. Where a party, who, by writing obligatory (without any penal sum), had bound himself to pay to *A. B.* an annuity of 20*l.* a year for her life, devised his estate to trustees upon certain trusts, until his son should attain the age of twenty-one years: Held, that the estate of the trustees ceased upon the death of the son under the age of twenty-one, all the purposes of the trust being then at an end; and that the trustees were only liable to pay to *A. B.* such arrears of the annuity as became due before the son's death. *Morant and Anne his Wife v. Gough and Another*, *T. 8 G. 4.* 206
2. *A. B.*, seised of a moiety of several estates, the whole of which had been her father's (but of which

which she took one part as heir of her father, and the remainder as heir of a niece, her father's grand-daughter), devised "all her moiety of and in all her late father's messuages," &c. : Held, that the devisee took, as well the estates which descended from the niece, as those which descended immediately from the testatrix's father. *Doe on the demise of Newton v. Taylor, M. 8 G. 4.* Page 384

DISTRIBUTIVE SHARE.

See EXECUTOR, 2.

EJECTMENT.

See LANDLORD AND TENANT.

EVIDENCE.

1. The fact of a pauper's remembering himself, when four years of age, in the parish of A., is no evidence that he was born there. *The King v. The Inhabitants of Trowbridge, T. 8 G. 4.* 252
2. An acknowledgment of a debt made by a debtor after arrest, but before an escape, is evidence against the marshal, in an action for the escape. Per Bayley J. *Rogers v. Jones, T. 8 G. 4.* 86
3. Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately; and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: Held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at, in order to ascertain whether the first was altered by

it; and that, therefore, the plaintiff could not exclude the second agreement, and proceed upon the counts setting out the first only. *Reede v. Deere, T. 8 G. 4.* Page 261

4. Where, in case the declaration stated that plaintiff delivered a trunk to the defendant, to be put into a coach at Chester, in the county of Chester, to wit, at, &c., and safely carried to Shrewsbury, and that through defendant's negligence it was lost, and it appeared in evidence that the trunk was delivered to the defendant at the city of Chester, which is a county of itself, separated from the county of Chester at large, but within its ambit: Held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called Chester. *Woodward v. Booth, T. 8 G. 4.* 301
5. The presumption is, that waste land which adjoins to a road belongs to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor. *Doe on the demises of Pring and Another, v. Pearsey, T. 8 G. 4.* 304
6. Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c., and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C., and that a certain messuage and four acres of land was parcel and a customary tenement of that manor, and that there is and from time whereof, &c., there hath been a custom within the manor, that the customary tenant

nant of that tenement shall have common of pasture upon the plaintiff's close; that J. S., being seized of the said customary tenement, and having occasion to use his common of pasture, entered the close in which, &c., and put his cattle in; and because the hedges and fences had been improperly erected, defendant threw them down. The plaintiff in his replication took issue upon the custom, and new assigned, that the defendant entered for other purposes than those mentioned in the plea: Held, first, that upon the issue joined upon the replication, the plaintiff was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the locus in quo under such custom, and that it was not necessary that that custom should be specially replied.

Held, secondly, that a custom for the lord of a manor to inclose the waste without limit or restriction, being inconsistent with the rights of the commoners, was bad in point of law, but that a custom to inclose (even as against common of turbary) parcels of the waste, leaving a sufficiency of common, was good, and that it lay on the lord or his grantee to shew that a sufficiency of common was left.

When the lord or his grantee erects fences upon the common, the commoner may by law destroy the fences; and, therefore, the fact of the defendant's having entered upon the plaintiff's close, and thrown down the whole of the fences which he had erected, when they might have entered upon the close without throwing down any part of the fences, was held not to be evidence that they entered for other

purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plaintiff on the new assignment. *Arlott v. Ellis and Others*, 7. 8 G. 4. Page 848

7. Where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement, as if it had been repeated therein: Held, that the clause referred to, could not be considered as annexed to the new agreement, so as to make an additional stamp necessary, on the ground of the agreement, with the clause, containing more than 1080 words. *Attwood v. Small and Others*, M. 8 G. 4. 369

8. By the special memorandum of a declaration, it was stated, that the plaintiff, administratrix, on the 20th of January, brought her bill into the office of the clerk of the declarations of King's Bench, according to the custom and practice of the court, and filed the same, as of Michaelmas term. Plea, that at the time of exhibiting the bill, the plaintiff was not administratrix, upon which issue was joined. It appeared that the defendant was neither an attorney nor a prisoner in the custody of the marshal. The bill was delivered on the 20th of January. The letters of administration were granted on the 10th of January: Held, that upon the issue joined the verdict was properly found for the plaintiff, the latter having been administratrix at the time when the bill was exhibited. *Woodbridge, Administratrix, v. Bishop*, M. 8 G. 4. 406

9. A customer deposited a sum of money with a banker, and received a note, by which the banker promised to pay the principal

- cipal "ten days' sight, with three per cent interest to the day of acceptance. The banker paid interest on the note, but at the same time told the customer that he would not in future pay more than two and a half per cent; and in his presence altered the terms of the note, by striking out *three* and inserting *two and a half*: Held, first, that the word "acceptance" meant *sight*, and that it need not be left with the maker for acceptance; secondly, that the payment of interest was evidence to shew that a principal sum was due; and that the note was admissible in evidence to shew the terms on which the deposit was made. *Sutton v. Toomer*, M. 8 G. 4. Page 416
10. In debt on an award, the execution of the submission by all the parties must be proved. *Farrer v. Owen*, M. 8 G. 4. 427
11. The statute 1 G. 4. c. 119. s. 11. enacts, that no suit in law be proceeded in; further than an arrest on mesne process, by any assignee of an insolvent's estate, without the consent of creditors, and approbation of one of the commissioners of the insolvent court: Held, in an action brought by an attorney to recover his bill of costs incurred in an action at the suit of such an assignee, that it was incumbent on the attorney to prove that the consent of creditors, and the approbation of one of the commissioners of the insolvent court, had been obtained, or, at all events, that he had informed his client that such consent was necessary. *Allison, Gent., one, &c. v. Rayner*, M. 8 G. 4. 441
12. Where a high constable presents persons for a nuisance in a highway, he must go before the grand jury, and give his evidence on oath. *The King v. Bridgewater and Taunton Canal Company*, M. 8 G. 4. Page 614
13. In an action of trover against the sheriff, for goods taken in execution, it is sufficient for the plaintiff to give in evidence the warrant issued by the undersheriff, under the sheriff's seal of office, and he is not bound to prove the writ. *Gibbins v. Phillips*, M. 8 G. 4. 535 n. (a).
14. A parish certificate, dated the 7th of September 1758, purported, in the body of it, to have been granted to a pauper and his family by two churchwardens and two overseers. It was signed and sealed by two overseers, and by one churchwarden only. The churchwardens for the year 1758 were nominated at *Easter*, and were proved to have been sworn into office on the 15th of *September*, at the visitation; but there was no direct evidence of their having been sworn into office before that time. The certifying parish, after the date of the certificate, had frequently relieved the pauper, and different members of his family, while they were residing in other parishes: Held, that in favour of such an ancient certificate, which had been treated by the certifying parish as valid, the Court would presume, that the churchwarden who executed the certificate was sworn before he executed it, and, therefore, that it was duly executed by him as churchwarden: Held, secondly, that the execution by two overseers and one churchwarden was an execution by the major part of the churchwardens and overseers, within the statute 8 & 9 W. 3. c. 80. *The King v. The Inhabitants of Whitchurch*, M. 8 G. 4. 573

15. Parol evidence of the fact of tenancy is admissible, although the tenant held under a written agreement. *The King v. The Inhabitants of Holy Trinity, Hull*, M. 8 G. 4. Page 611

16. It was proved by a pauper that he had been bound apprentice twenty-three years ago, to A. B.; that indentures were signed and sealed, and that he served seven years; and that A. B. had the indentures, that when the apprenticeship expired, the pauper asked A. B. for the indentures, and he said the parish officers had them. Held, that the declarations of A. B., who might have been called as a witness, were not admissible in evidence, and that parol evidence of the contents was not admissible. *The King v. The Inhabitants of Denio*, M. 8 G. 4. 620

17. Where a party examined before commissioners of bankrupts admitted that he had received a sum of money on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt: Held, that this was not evidence sufficient to support a count on an account stated with the assignees.

Query, Whether an admission obtained by such compulsory examination can be used as evidence in such an action. *Tucker and Another v. Assignees of Blitham*, M. 8 G. 4. 623

18. Where a parol agreement was made between A. and B. that the former should let, and the latter take, certain premises upon the terms and conditions contained in a lease of the same premises granted by A. to C.: Held, that in an action by A. against B. for rent and non-repair, the lease could not be read

in evidence, unless duly stamped. *Tucker v. Power*, H. 8 & 9 G. 4.

19. An action for not returning bills deposited with defendant, the following unstamped memorandum, signed by defendant, was held to be admissible in evidence: "I have in my hands three bills, which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted or return on demand." *Mullett v. Hutchison*, H. 8 & 9 G. 4. 639

20. Where an examination of a soldier, taken before two magistrates, was tendered in evidence to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction: Held, that it was not admissible. *The King v. The Inhabitants of All Saints, Southampton*, H. 8 & 9 G. 4. 785

21. Upon an issue whether a certain messuage is situate within a chapelry, a person who occupies rateable property within the chapelry is a competent witness to prove that it is. *Marsden and Another v. Stansfield*, H. 8 & 9 G. 4. 815

EXECUTOR

1. A count in assumpsit for money had and received by the defendant as executor to the use of the plaintiff, cannot be joined with a count for money due to plaintiff from defendant as executor, upon an account stated with him, of money due from him as executor.

Semble, That a count for money paid by the plaintiff to the use of the defendant as executor, may be joined with such a count on

an account stated. *Ashby v. Ashby and Another*, M. 8 G. 4.

Page 444

2. An action at law for a distributive share of an intestate's property cannot be maintained against the administrator, nor against his executor, although he may have expressly promised to pay. *Jones v. Tanner*, M. 8 G. 4. 542

FACTOR.

See PRINCIPAL AND AGENT.

FEME COVERT.

Where a married woman, separated from her husband, lived with her father, and acted as his servant: Held, that he might maintain an action against a person by whom she was debauched, and had a child. *Harper v. Luffkin*, M. 8 G. 4. 387

FIERI FACIAS.

Where *A. B.* executed a warrant of attorney in the name of *C. B.*, and judgment was entered up, and a fi. fa. issued against him by that name: Held, that this was right, and that the sheriff was bound to execute it. *Reeves v. Slater*, M. 8 G. 4. 496

FOREIGN ATTACHMENT.

Where one of several defendants in a proceeding by foreign attachment in the mayor's court of London, removes by certiorari, he must put in bail in *K. B.* for all the defendants, otherwise a procedendo will be granted. *Keat and Another v. Goldstein and Castles*, M. 8 G. 4. 525

GAME.

Grouse are not birds of warren. *The Duke of Devonshire v. Lodge*, T. 8 G. 4. Page 36

GAMING.

The plaintiff in an action on the statute 9 Anne c. 14. s. 2. recovered treble the value of money lost at play; the loser not having sued within the time prescribed by the statute, a writ of error was brought by the defendant, and judgment was affirmed, without costs: Held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs. *Wiltan v. Taylor*, T. 8 G. 4. 111

GAOL RATE.

See POOR RATE, 5.

GROUSE.

Grouse are not birds of warren. *The Duke of Devonshire v. Lodge*, T. 8 G. 4. 36

HIGH CONSTABLE.

See HIGHWAY, 5.

Where the high constable of a borough, by the direction of the justices, employed and paid a number of special constables to suppress riots at an election, and the ordinary constables were also constantly employed by him during the same period in endeavouring to keep the peace, for which service he made them a compensation: Held, that the justices were warranted in considering

sidering the monies so expended as "extraordinary expenses incurred by the high constable in case of riot," within the meaning of the 41 G. 3. c. 78. s. 2., and in making an order upon the treasurer to reimburse him those expenses. *The King v. The Justices of the Borough of Leicester*, T. 8 G. 4. Page 6

HIGHWAY.

1. Where a landowner suffered the public to use, for several years, a road through his estate for all purposes, except that of carrying coals: Held, that this was either a limited dedication of the road to the public, or no dedication at all, but only a licence revocable; and that a person carrying coals along the road after notice not to do so, was a trespasser.

Semble, that there may be a limited dedication of a highway to the public. *The Marquis of Stafford v. Coyney*, T. 8 G. 4.

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2. By the general turnpike act, stat. 3 G. 4. c. 126. s. 86., it is enacted, "that after any new road shall be completed, the lands or grounds constituting any former roads or road, or so much, and such part or parts thereof as in the judgment of the trustees may thereby become useless or unnecessary, shall and may be stopped up, and discontinued as public highways, (unless leading over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town, or place, lands, or tenements, to which such new road does not immediately lead, and which may, therefore, be deemed proper to be kept open, either as a public or private way or ways, for the use of any in-

habitant at large, or any individual or individuals)": Held, that the exception did not take away from the trustees the power of stopping up the roads therein mentioned, but left them at their discretion to do so or not; and, therefore, that the trustees might stop up, and give up to the owner of the adjoining land an old road leading to a church, &c., to which the new road did not immediately lead. *De Beauvoir v. Welch and Another*, T. 8 G. 4. Page 266

3. Where in trespass against two magistrates for breaking and entering the plaintiff's close in the parish of A. and seizing his sheep, it appeared that the defendants, upon the complaint of the surveyor of the highways, appointed for the whole parish, convicted the plaintiff of neglecting to do statute duty, and issued a warrant to levy the penalty under which the act complained of was done: Held, that the conviction being good upon the face of it, was a sufficient defence, and that the plaintiff could not in this action try the question, whether the land which he occupied was exempt from the burthen of repairing the roads in other parts of the parish. *Fawcett v. Fowles and Another*, M. 8 G. 4.

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4. Where a magistrate presented a road in the township of F., "upon the information upon oath of A. B., surveyor of the highways for the township of C., which is thirty-five miles distant from the township of F., &c.": Held, in arrest of judgment, that this presentment was bad; for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in C. had no authority under the

13 G. 3.

13 G. 3. c. 78. s. 24. to give information as to the road in *P. The King v. The Inhabitants of Pylingdale*, M. 8 G. 4. Page 436

5. Where a high constable presents persons for a nuisance in a highway, he must go before the grand jury, and give his evidence on oath. *The King v. The Bridge-water and Tawnton Canal Company*, M. 8 G. 4. 514

6. By a local act certain trustees of roads were authorised to make an order for stopping up part of certain old highways, and a right of appeal was given to any person or persons who might be aggrieved by the making of any such order: Held, that in a notice of appeal against an order of the trustees for stopping up a highway, it was necessary to state that the party intending to appeal was aggrieved by the order. *The King v. Justices of West Riding of Yorkshire*, H. 8 & 9 G. 4. 678

INCLOSURE ACT.

Where an inclosure act gave the commissioners power to award lands in exchange for others in an adjoining parish, and also to award lands to those who bought them of persons entitled to allotments: Held, that they might award lands given in exchange partly for other lands and partly for money, and that the award need not have an ad valorem stamp upon the money consideration. *Doe on the demise of Lord Suffield v. Preston*, M. 8 G. 4. 592

INDICTMENT.

1. Indictment charged that defendants removed a culvert in the parish of S., opposite to a

mill there, in a highway there leading from S. to H.: Held, on motion in arrest of judgment, that it sufficiently appeared that the culvert removed was in the parish of S. *The King v. Knight and Others*, M. 8 G. 4. Page 413

2. An indictment charged that A. B., on, &c. being the servant of J. H., on the same day, &c. one gold ring, &c. then and there being in the possession of J. H., and being his goods and chattels, feloniously did steal: Held, that the fair import of the charge was, that A. B. was the servant of J. H. at the time when the theft was committed, and that the indictment, therefore, warranted judgment of transportation for fourteen years. *The King v. Mary Somerton*, M. 8 G. 4. 468

INSOLVENT DEBTORS' ACT.

The stat. 1. G. 4. c. 119. s. 11. enacts, that no suit in law be proceeded in further than an arrest on mesne process by any assignee of an insolvent's estate, without the consent of creditors and approbation of one of the commissioner's of the insolvent court: Held, in an action brought by an attorney to recover his bill of costs incurred in an action at the suit of such assignee, that it was incumbent on the attorney to prove that the consent of creditors and the approbation of one of the commissioners of the insolvent court had been obtained, or, at all events, that he had informed his client that such consent was necessary. *Allison, Gent., one, &c. v. Rayner*, M. 8 G. 4. 441

INSURANCE.

1. A policy in the usual form was effected on pearl-ashes, on a voyage

voyage at and from Liverpool to London. The captain took in goods at Liverpool for Southampton as well as London, intending to go first to the former place. He accordingly went into Southampton and delivered the goods shipped for that place, and afterwards proceeded to London. The termini of the voyage being the same as those described in the policy, it was held to be the same voyage until the vessel reached the dividing point, and that the policy attached, although putting into Southampton, was a deviation.

The goods insured received considerable damage from sea water. But they were not examined at Southampton, nor until they reached London, when the damage was found to amount to 60 per cent. Before the vessel reached the dividing point of the two voyages she had met with bad weather, and had made much water, and on one occasion the water pumped up appeared to hold the pearl ashes in solution. On the voyage from Southampton to London there were no heavy seas, and the weather was tolerably fair. Under these circumstances it was held, that it was a question for the jury, whether the pearl ashes had sustained damage to the amount of 3 per cent. before the deviation, and they having found that they had sustained damage to that amount, the Court refused to disturb the verdict. *Hare v. Travis*, T. 8 G. 4. Page 14.

3. A ship having goods on board which were insured, but warranted free from average unless general or the ship should be stranded, was compelled in the course of her voyage to put into a tide harbour, and was there

moored along side a quay in the usual place for ships of her burden. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore to prevent her falling over upon the tide leaving her. The rope with which she was so fastened, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured: Held, that this was a stranding within the meaning of that word in the policy, and that the underwriters were liable for a partial loss, although the stranding might have been occasioned remotely by the negligence of the crew in not providing a rope of sufficient strength to fasten the vessel to the shore. *Bishop and Another v. Pentland*, T. 8 G. 4. Page 219.

3. Where a ship being in a very leaky state was deserted at sea by her crew, acting bona fide for the preservation of their lives, and was on the following day found and taken possession of by the crew of another vessel, who succeeded in taking her into port, where she was repaired and afterwards sent to this country, but subject to claims for salvage and repairs equal to or exceeding her value: Held, that the owners having given notice of abandonment before they received any tidings of the ship's safety, were entitled to recover against the underwriters as for a total loss. *Holdsworth and Another v. Wise and Others*, H. 8 & 9 G. 4. 794.

IRISH PEER.

See Annex 2.

IRISHMAN.

See SETTLEMENT, I.

JOINT

JOINT STOCK COMPANY.

1. Where, in an action for goods supplied for the purpose of working a mine, it appeared that the defendant had paid money for certain shares, and received a certificate that she was a proprietor of those shares, and that she had acknowledged that she was a shareholder; but no assignment of any interest in the mine had been made to her: Held, that the action could not be maintained. *Vice v. Lady Anson*, M. 8 G. 4. Page 409
2. A., an attorney, and B. and C. had been members of a trading company. After the dissolution of that company, B. and C. were sued by creditors of the company, and retained A. to defend the action, and in the course of making that defence a bill of costs was incurred: Held, that A., as a member of the company, being jointly liable to contribute to the expense of defending those actions, could not maintain any action against B. and C. for his bill of costs. *Milburne v. Codd and Another*, M. 8 G. 4. 419

JUDGMENT.

See TROVER, 3.

JUDGMENT OF NON PROS.

See PRACTICE, 7.

JUSTICES.

1. Where the high constable of a borough by the direction of the justices, employed and paid a number of special constables to suppress riots at an election; and the ordinary constables were also constantly employed by him during the same period, in endeavouring to keep the peace, for

which service he made them a compensation: Held, that the justices were warranted in considering the monies so expended as "extraordinary expenses incurred by the high constable in case of riot," within the meaning of the 41 G. 3. c. 78. s. 2. and in making an order upon the treasurer to reimburse him those expenses. *The King v. The Justices of the Borough of Leicester*, T. 8 G. 4. Page 6

2. Where in trespass against two magistrates, for breaking and entering the plaintiff's close in the parish of A., and seizing his sheep; it appeared that the defendants upon the complaint of the surveyor of the highways appointed for the whole parish, convicted the plaintiff of neglecting to do statute duty, and issued a warrant to levy the penalty, under which the act complained of was done: Held, that the conviction being good upon the face of it, was a sufficient defence, and that the plaintiff could not in this action try the question, whether the land which he occupied was exempt from the burthen of repairing the roads in other parts of the parish. *Fawcett v. Fowles and Another*, M. 8 G. 4. 394

3. Where a magistrate presented a road in the township of R. upon the information upon oath of A. D., surveyor of the highways for the township of C., which is thirty-five miles distant from the township of R., &c.: Held, in arrest of judgment, that this presentment was bad, for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in C. had no authority under the 19 G. 3. c. 78. s. 24. to give information as

to the road in *F. The King v. The Inhabitants of Fylingdales*, M. 8 G. 4. Page 438

4. Where a person employed by an attorney to keep possession of goods seized under a fieri facias, made complaint to a magistrate, that he could not obtain payment for his services; and the magistrate having summoned the party and heard the complaint, proceeded under the 20 G. 2. c. 19. and made an order upon the attorney for payment of a certain sum, which was afterwards levied on his goods: Held, that the magistrate was liable to an action of trespass, for that the service performed was not of such a nature as to give him jurisdiction under the 20 G. 2. c. 19. *Branwell v. Penneck*, M. 8 G. 4. 536

LABOURER.

See JUSTICES, 4.

LANDLORD AND TENANT.

1. A tenancy for years, determinable on lives, is not a holding for "any term or number of years certain," within the 1 G. 4. c. 78. s. 1. *Doe on the demise of Pemberton and Others v. Roe*, T. 8 G. 4. 2
2. By lease, the lessor demised for a term of years a piece of ground at a fixed annual rent. The tenant covenanted not to build on the land without the license of the lessor. The lessor covenanted to pay all taxes already charged or to be charged upon or in respect of the demised piece of ground, during the continuance of the term. At the time when the lease was executed, the lessor gave a license to the lessee to build on the land demised. The lessee did build; and thereby increased the annual value of the

premises: Held, that the landlord was liable upon his covenant to pay the taxes in proportion to the rent reserved, and not to the improved value.

The tenant compounded for his taxes under the provisions of a local act, and in consequence of such composition, his premises were assessed at a less annual sum than the improved annual value: Held, that the tenant paid taxes in respect of the whole improved annual value, and that the landlord was to pay that proportion of the taxes paid, which the rent bore to such improved annual value. *Watson v. Home*, T. 8 G. 4. Page 285

3. Parol evidence of the fact of tenancy is admissible, although the tenant hold under a written agreement. *The King v. The Inhabitants of Holy Trinity, Hull*, M. 8 G. 4. 611

4. Where a parol agreement was made between A. and B.; that the former should let, and the latter take certain premises, upon the terms and conditions contained in a lease of the same premises granted by A. to C.: Held, that in an action by A. against B. for rent and non-repair, the lease could not be read in evidence unless duly stamped. *Turner v. Power*, H. 8 & 9 G. 4. 625

5. A party contracted for an assignment of a lease of a public-house, which was described as holden at a certain net rent, upon usual and common covenants. The lease contained a covenant by the tenant to pay land-tax, sewer's rate, and all other taxes; and a proviso for re-entry, if any business but that of a victualler should be carried on in the house; and it was proved that a considerable majority of public-house leases contained such a proviso: Held,

Held, that the covenant to pay land-tax, &c. was a common covenant in a lease reserving a net rent; and that the proviso for re-entry must, with reference to a lease of a public-house, also be considered usual and common. *Bennett v. Womack*, H. 8 & 9 G. 4. Page 627

6. In construing acts of parliament, the Court must take into consideration not only the language of the preamble or of any particular clause, but of the whole act; and if in some of the enacting clauses expressions are found of more extensive import than in others, or than in the preamble, the Court will give effect to those more extensive expressions, if upon a view of the whole act it appears to have been the intention of the legislature that they should have effect.

Upon this ground, where a lease of certain waggon-ways was granted to A. B. under the authority of an act of parliament, in which, as well as in the lease, there was a proviso for re-entry, in case he neglected in any one year to bring a certain quantity of coals to C. for the use of the inhabitants of L., and sell them there at a certain price; and by a subsequent act, the preamble of which recited that the price was inadequate, and that the inhabitants of L. would sustain great inconvenience if A. B. ceased to supply them with coals; it was enacted, first, that the former act, confirming the lease, (except such parts as were thereby altered or repealed,) should continue; that A. B. might sell his coals brought to and deposited at C., or at any other place near thereto, to be used as a repository for coals,

instead thereof, at a certain increased price. Another section provided, that if A. B. neglected to bring the stipulated quantity of coals to C., or to such other place near thereto, to be used as a repository for coals instead thereof, and sell them there at the price fixed by that act, his interest in the waggon-ways should cease: Held, that although the preamble did not recite an intention to give A. B. liberty to change the place used as a repository for coals; and although it was not expressly enacted that he might do so, yet that the intention of the legislature to give him that privilege was clear, and that he might do so without forfeiting his interest in the waggon-ways. *Doe dem. Bywater v. Brandling and Others*, H. 8 & 9 G. 4.

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LATITAT.

See PRACTICE, 11.

LEASE.

See LANDLORD AND TENANT, 2. 4, 5, 6. STAMP, 5.

LIBEL.

Declaration stated, that defendant contriving, &c. did print and publish of and concerning the plaintiff a libel, containing the false and scandalous matter following, without alleging that that matter was of and concerning the plaintiff, and then set out the libel, which on the face of it did not manifestly appear to relate to the plaintiff, and there was no innuendo to connect it with the plaintiff: Held, upon writ of error, that the count was bad. *Clement v. Fisher (in error)*, M. 8 G. 4.

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LICENCE.

LICENCE.

See TROYER, 4.

LIEN.

1. A wharfinger at Hull claimed a general lien for wharfage, labourage, (comprising loading, weighing, and delivery), and warehouse rent. The claim for wharfage was admitted, but as to the residue, upon a case, stating that in Hull such claim had, in a great majority of instances, been acquiesced in, but in others had been rejected, and that the right had long been, and still was a disputed point there: Held, that the claim could not be supported, as the right of general lien arises out of an express or implied contract, of which the former had not been made, and the latter could not be inferred from the circumstances stated in the case. *Holderness and Another, Assignees, v. Collinson*, T. 8 G. 4.

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2. Where a broker having accepted bills for his principal, on the security of goods then in his hands, pledged the goods with a person who had notice of the agency, but did not inform the principal of this transaction: Held, that under the 6 G. 4. c. 94. s. 5. the broker could only transfer such right as he had, which was a right to be indemnified against the bills which he had accepted; and that the principal having satisfied those bills, was entitled to have back his goods from the pawnee, without paying the amount for which they were pledged. *Fletcher v. Heath and Others*, M. 8 G. 4.

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MANDAMUS.

Where an appeal against an order of removal was dismissed on the

MARSHAL.

ground that the appellant had not given the notice required by the rules of the justices, this Court, thinking it reasonable that the appeal should be heard, granted a mandamus to the justices to enter continuances and hear the appeal. *The King v. The Justices of Lancashire*, H. 8 & 9 G. 4.

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MARKET.

The lord of an ancient market may, by law, have a right to prevent other persons from selling goods in their private houses situated within the limits of his franchise.

Where such a market had been from ancient times held in a public street, but in consequence of the increased population and traffic, persons frequenting the market-place were subjected to inconvenience and danger, and the lord had permitted part of the market-place to be used for other purposes than for the sale of articles usually sold there. In an action, brought by the lord against the owner of a house adjoining to the market-place for there opening a shop and selling goods, but who, at the time when he sold the goods, had a stall in the market-place which he might have occupied; it was held, that it was properly submitted to the jury, to find whether, from the state of the market-place, the defendant had a reasonable cause for selling in his private house; and a verdict having been found for the plaintiff, the Court refused to grant a new trial. *Mosley v. Walker*, T. 8 G. 4.

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MARSHAL.

See PRACTICE, 15.

MASTER

MASTER AND SERVANT.

Where a person, employed by an attorney to keep possession of goods seized under a fieri facias, made complaint to a magistrate, that he could not obtain payment for his services, and the magistrate, having summoned the party and heard the complaint, proceeded under the 10 G. 2. c. 19, and made an order upon the attorney for payment of a certain sum, which was afterwards levied on his goods: Held, that, the magistrate was liable to an action of trespass, for that the service performed was not of such a nature as to give him jurisdiction under the 20 G. 2. c. 19. *Braswell v. Pasneck*, M. & G. 4.

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MESNE PROFITS.

See *Cooks*, 3.

MONEY HAD AND RECEIVED.

See *Pleading*, 7.

MORTGAGOR AND MORTGAGEE.

Where A., the managing owner of a ship, mortgaged his share to B., who procured the transfer to be duly indorsed on the certificate of registry, but A. continued in the management as before, and B. did not take possession or interfere in the concerns of the ship: Held, that he was not liable for repairs and necessities done and supplied in pursuance of A.'s orders. *Briggs v. Wilkinson and Others*, T. 8 G. 4.

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NOTICE OF APPEAL.

See *Appeal*, 2, 3, 4.

VOL. VII.

OVERSEER.

See *Appeal*, 3. POOR RATE, 5.

1. An overseer has not, by virtue of his office, any authority to borrow money, and in an action against a surety on a bond conditioned for the overseer's faithfully accounting for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer, and applied by him to parochial purposes. *Leigh and Another v. Taylor*, M. & G. 4. Page 391.
2. By statute 17 G. 2. s. 2 & s. 3 it is enacted, "That overseers of the poor shall permit inhabitants of the parish to inspect rates at all reasonable times;" and, by section 8. "if any overseer shall not permit an inhabitant to inspect the rate, such overseer for every such offence shall forfeit and pay to the party aggrieved the sum of 20l.:" Held, first, that a demand to inspect a rate made on the overseer by a rateable inhabitant in the presence of his attorney, was a lawful demand.

Secondly, that the refusal to produce the rate upon a lawful demand constitutes the inhabitant a party grieved within the meaning of the statute.

Thirdly, that a notice that a rate of so much in the pound would be collected forthwith, was a good publication of the rate, although it was not stated that it had been allowed by the justices.

Fourthly, that a demand to see "the rate" was sufficiently specific, there being only one rate in use at that time.

Fifthly, that the overseer, by refusing to shew the rate, and referring the party to the select vestry as a place where he would be allowed to inspect it, incurred

red the penalty imposed by the 17 G. 2. c. 3.

Sixthly, that an assistant overseer, appointed by a select vestry under the provisions of the 59 G. 3. c. 12. s. 9., is not liable to the penalties imposed by the 17 G. 2. c. 3. s. 3. upon overseers not permitting inhabitants to inspect the rate, unless it be proved that the select vestry have imposed upon such assistant overseer the duty of producing the rate to the inhabitants. *Bennett v. Edwards*, M. 8 G. 4. Page 586

3. Where a demand to inspect a rate was made upon an overseer on his own premises, not far from his house, and he refused to allow the inspection, but not on the ground that it was inconvenient to go to his house for that purpose: Held, in an action against him for the refusal, that this was a reasonable demand. *Parker v. Edwards*, M. 8 G. 4.

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PARTNERSHIP.

See POOR RATE, 1. POWER OF ATTORNEY.

1. Where, in an action for goods supplied for the purpose of working a mine, it appeared that the defendant had paid money for certain shares, and received a certificate that she was proprietor of those shares; and that she had acknowledged that she was a shareholder, but no assignment of any interest in the mine had been made to her: Held, that the action could not be maintained. *Vice v. Lady Anson*, M. 8 G. 4. 409
2. A., an attorney, and B. and C., had been members of a trading company. After the dissolution of that company, B. and C. were sued by creditors of the com-

pany, and retained A. to defend the actions, and in the course of making that defence a bill of costs was incurred: Held, that A., as a member of the company, being jointly liable to contribute to the expense of defending those actions, could not maintain any action against B. and C. for his bill of costs. *Milburn v. Codd*, M. 8 G. 4. Page 419

3. Where A. and B. agreed to take a farm, and pay C., the former occupier, for certain articles, by bills at three months, and C. afterwards, without the knowledge or consent of A., took from B. bills for the amount, payable at six and twelve months, accepted by himself in his own name and A.'s: Held that the latter could not be sued on the bills. *Green-slade v. Dower and Colman*, H. 8 & 9 G. 4. 635

PAYMENT.

1. Where the seller of goods received from the purchaser an order upon his banker for the price, and the latter (with whom money had been deposited to meet that and certain other demands), offered to pay in cash, deducting discount for the period of credit, or by a bill upon a third person, which the seller elected to take: Held, that although the bill was afterwards dishonoured, he could not sue the purchaser for the price of the goods. *Smith and Others v. Ferrand*, T. 8 G. 4. 19
2. A payment made, in order to obtain possession of goods or property to which a party is entitled, and of which he cannot otherwise obtain possession at the time, is a compulsory, and not a voluntary payment, and may be recovered back.

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The agent for the grantor of several annuities delivered him four accounts in the course of eighteen months, and gave him credit for all the half-yearly instalments of the several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, and paid the balance of the accounts as if they had been received, and in the later accounts, never brought forward these sums, nor intimated that he expected them to be repaid: Held, upon a bill of exceptions, that upon this evidence, the jury were properly told by the Judge, that they might infer an agreement whereby the agent made himself personally responsible for the payment of those annuity instalments, in default of payment by the grantors. *Shaw and Others, Assignees of Howard and Gibbs, v. Woodcock, T. 8 G. 4. Page 73*

PENAL ACTION.

See OVERSEER, 2.

The plaintiff, in an action on the statute 9 Anne, c. 14. s. 2., recovered treble the value of money lost at play, the loser not having sued within the time prescribed by the statute, a writ of error was brought by the defendant, and judgment was affirmed without costs: Held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs. *Willan v. Taylor, T. 8 G. 4. 111*

PLEADING.

1. Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were

also counts upon each separately; and it appeared when the instruments were produced in evidence by the plaintiff, that the first only was stamped: Held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it, and that therefore the plaintiff could not exclude the second agreement and proceed upon the counts setting out the first only. *Read v. Deere, T. 8 G. 4.*

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2. Where in case the declaration stated that the plaintiff delivered a trunk to the defendant to be put into a coach at *Chester, in the county of Chester*, to wit, at, &c., and safely carried to *Shrewsbury*, and that through defendant's negligence it was lost; and it appeared in evidence that the trunk was delivered to the defendant at the city of *Chester*, which is a county of itself separate from the county of *Chester* at large, but within its ambit: Held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called *Chester*: *Woodward, v. Booth, T. 8 G. 4. 301*

3. Trespass for breaking and entering the plaintiff's close and treading down the grass, &c.; and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of *C.*, and that a certain messuage and four acres of land was parcel and a customary tenement of that manor; and that there is and from time whereof, &c. there hath been a custom

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within

within the manor that the customary tenant of that tenement shall have common of pasture upon the plaintiff's close; that *J. B.* being seized of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c., and put his cattle in, and because the hedges and fences had been improperly erected, defendant threw them down. The plaintiff in his replication took issue upon the custom, and now assigned that the defendant entered for other purposes than those mentioned in the plea.

Held, first, that upon the issue joined upon the replication, the plaintiff was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the locus in quo under such custom, and that it was not necessary that that custom should be specially replied.

Held, secondly, that a custom for the lord of a manor to inclose the waste without limit or restriction, being inconsistent with the rights of the commoners, was bad in point of law, but that a custom to inclose (even as against common of turbary) parcels of the waste, leaving a sufficiency of common, was good; and that it lay on the lord or his grantee to show that a sufficiency of common was left.

When the lord or his grantee erects fences upon the common, the commoners may by law destroy the fences, and therefore the fact of the defendants having entered upon the plaintiff's close, and thrown down the whole of the fences which he had erected, when they might have entered upon the close without throwing

down any part of the fences, was held not to be evidence that they entered for other purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plaintiff on the new assignment. *Arlett v. Ellis*, 11 B. & C. 411. Page 346.

By the special memorandums of a declaration it was stated that the plaintiff administratrix, on the 20th of January, brought her bill into the office of the clerk of the declarations of K. B. according to the course and practice of the court, and filed the same as of Michaelmas term. Plea, that at the time of exhibiting the bill, the plaintiff was not administratrix, upon which issue was joined. It appeared that the defendant was neither an attorney nor a prisoner in the custody of the marshal. The bill was delivered on the 20th of January. The letters of administration were granted on the 10th of January: Held, that upon the issue joined the verdict was properly found for the plaintiff, the latter having been administratrix at the time when the bill was exhibited. *Woodbridge, Administratrix, v. Bishop*, M. & G. 4. 406

15. Assumpsit in consideration that the plaintiff at the request of the defendant would consent to suspend proceedings against A. on a cognovit, defendant promised to pay 80*l.* on account of the debt (for which the cognovit was given) on the 1st of April then next. Averment, that the plaintiff did suspend proceedings on the cognovit. The plaintiff at the trial proved the following agreement in writing: "The plaintiff having at my request consented to suspend proceedings against A., I do hereby, in consideration thereof, personally promise

promise to pay \$100 on account of the debt on the 1st day of April." Held, that as the request must have preceded the consent to suspend proceedings, the contract might be declared on as an executory contract, and, consequently, that there was not any variance. Secondly, that the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least, until the 1st of April. Thirdly, that after verdict the averment that "plaintiff had suspended proceedings," was sufficient, without specifying for what period. *Payne v. Wilson, Gent., one, &c., M. 8 G. 4.*

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6. Where a magistrate presented a road in the township of F. "upon the information upon oath of A. B., surveyor of the highways for the township of C., which is thirty-five miles distant from the township of F., &c.": Held in arrest of judgment, that this presentment was bad, for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in C. had no authority under the 13 G. 3. c. 78. s. 24: to give information as to the road in F. *The King v. The Inhabitants of Eglingsdales, M. 8 G. 4.* 438

7. A count in assumpsit for money had and received by the defendant, as executor, to the use of the plaintiff, cannot be joined with a count for money due to plaintiff from defendant, as executor, upon an account stated with him of money due from him as executor.

Semble, That a count for money paid by plaintiff to the use of the defendant as executor, may be joined with such a count on an

account stated. *Abbey v. Abbey, M. 8 G. 4.* Page 444

8. Declaration stated that defendant contriving, &c., did print and publish of and concerning the plaintiff a libel containing the false and scandalous matter following, without alleging that that matter was of and concerning the plaintiff, and then set out the libel, which on the face of it did not manifestly appear to relate to the plaintiff, and there was no innuendo to connect it with the plaintiff: Held, upon writ of error, that the count was bad. *Clement v. Fisher (in error), M. 8 G. 4.* 459

9. An indictment charged that A. B. on, &c., being the servant of J. H., on the same day, &c., one gold ring, &c., then and there being in the possession of J. H., and being his goods and chattels, feloniously did steal: Held, that the fair import of the charge was that A. B. was the servant of J. H. at the time when the theft was committed, and that the indictment, therefore, warranted judgment of transportation for fourteen years. *The King v. Mary Somerton, M. 8 G. 4.* 463

10. Where a bill of exchange payable after sight, having been presented for acceptance and refused, and duly protested, was, eight days afterwards, accepted by a third person for the honour of the drawer, and when at maturity according to that acceptance, was presented for payment both to the drawee and the acceptor for honour: Held, in actions against the latter and the drawer, that these presentments for payment were made at a proper time. But it was held necessary that the presentment to the drawee for payment should be averred in the declaration;

and for want of such averment judgment was arrested. *Williams v. Germaine*, M. 8 G. 4. Page 468

11. Information for usurping the office of burgess of the borough of S. Plea, that the burgesses were a body corporate by prescription as well as by charter, and that the common council, or major part of them, being duly assembled as such common council for such purpose within the borough, from time to time as often as it had seemed fit and convenient to them, had elected so many persons to be burgesses as to them seemed fit. The plea then (after setting out a charter by which the king granted that there should be a mayor, ten aldermen, and ten capital burgesses, and that they should be the common council for all things touching the government of the borough,) stated that from thenceforth there had been and still were within the borough, a mayor, ten aldermen, and ten capital burgesses, and an indefinite number of burgesses, and a common council; that on, &c. the then mayor and divers to wit, nine of the aldermen of the borough, being the major part of the aldermen, and nine of the capital burgesses, being the major part of such ten capital burgesses so granted by the charter, being the major part of the common council of the borough for the time being, duly assembled and met together as such common council for the purpose of electing a burgess, and being so assembled, it seemed fit to them to elect, and they did elect the defendant to be a burgess. Replication, that notice of the purpose for which the supposed assembly of the common council was to be held, was not any time before the said assembly

was held, given to the aldermen or capital burgesses of the borough, or any or either of them: Held, upon demurrer, that the replication was bad, because it assumed as a general proposition of law, that there could not be any lawful assembly for the purpose of electing a burgess without previous notice of the purpose of the meeting having been given to every member of each select body of the common council; whereas, if all the members of such select body were present at, and concurred in the election, such notice would have been unnecessary. *The King v. Sir G. Chetwynd, Bart.* H. 8 & 9 G. 4.

Page 695

12. Scire facias on recognisance of bail. Plea, no ca. sa. duly issued, lodged, and returned. Replication, ca. sa. issued and returned non est inventus. Rejoinder, that the ca. sa. did not lie in the sheriff's office four days, exclusive of the day it was lodged, the return-day, and an intervening Sunday. Demurrer. Held, upon demurrer, that the rejoinder was bad. *Sandon v. Proctor and Another*, H. 8 & 9 G. 4. 800

13. Debt on bond. Plea, after craving oyer of the bond and condition, which was, that A. B. should faithfully account for all monies received by him as collecting clerk, that A. B. did account. Replication, that A. B. received divers sums, amounting to 2000*l.*, for which he did not account. Rejoinder, that the sums mentioned in the replication were three sums of 1000*l.*, 500*l.*, and 500*l.* received by A. B., of C., D., and F. and G., and that A. B. accounted for those sums. Surrejoinder, that the sums mentioned in the replication were other and different sums

... sums than those alleged in the rejoinder to have been received and accounted for by A. B., and concluding to the country: Held, upon special demurrer, that the surrejoinder was good. *Calvert and Another v. Gordon, Ex-ecutrix*, *HL. 8 & 9 G. 4.* Page 809

POOR.

See PENAL ACTION.

POOR RATE.

See OVERSEER, 2.

1. Where only one of several partners was resident in a parish: Held, that he could not be rated to the relief of the poor in respect of more than his share of the partnership personal property. *The King v. Gosse*, *T. 8 G. 4.*

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2. Where, by act of parliament, certain persons were empowered to make a dock, and take certain rates and duties from ships resorting to it, and the same statute provided that those rates should be applied to paying off the debt incurred in making the dock and to keeping it in repair, and that then the rates should be lowered, reserving sufficient to keep the dock, &c. in repair: Held, that the dock company were not rateable to the relief of the poor in respect of the dock dues received by them, nor of the premises purchased or hired, and used by them for the purposes of the dock, no individual having any beneficial occupation of those premises. *The King v. The Inhabitants of the Parish of Liverpool*, *T. 8 G. 4.*

61

3. Where the surplus tolls of a navigation were directed by act of parliament to be expended in

repairing public bridges and highways: Held, that they were not rateable to the relief of the poor. *The King v. The Trustees of the River Weaver Navigation*, *T. 8 G. 4.* Page 70 n. (c).

4. A canal company is rateable to the relief of the poor in every parish through which the canal passes, in proportion to the profits which the land occupied by them in such parish yields, and, therefore, where a canal passed through several parishes in which the tonnage dues payable varied, it was held that the company were rateable to the relief of the poor of each parish for the amount of tonnage dues actually earned there, and not for a part of the whole amount earned along the whole line of the canal, in proportion to the length of the canal in that parish. *The King v. The Inhabitants of Kingswinford*, *T. 8 G. 4.*

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5. By a local act for the relief of the poor, certain commissioners were enabled to make rates upon all and every person or persons who held, occupied, or possessed land in the parish; it was held that a corporation was liable to be rated, although by a clause giving an appeal to the quarter sessions to any party aggrieved, such party was bound to enter into a recognisance.

The act of parliament required that before any action should be brought to recover any rates, there should be a personal demand of the same, or a demand in writing left at the place of abode of the persons charged, or on the premises charged: Held, by *Bayley J.*, that a demand made at a meeting of the corporate body duly convened was sufficient; and, by *Littledale J.*, that a demand fixed on the

3 L 4

premises

premises charged under the rate was sufficient.

The act directed all actions to be brought in the name of the treasurer. An order was made by the commissioners, that an action should be brought to recover certain rates. At the time when this order was made, A. was treasurer, but when the action was commenced, B. was treasurer. Held, that the latter had authority to prosecute the action in his name for the benefit of the commissioners, and was entitled to recover the rates due to the commissioners before he was appointed treasurer. Held, also, that it was not competent to the defendant in such action to object to the rates on the ground that the property rated was not sufficiently described in them, that being a ground of appeal to the quarter sessions.

By an act of parliament authorising the levying of a gaol-rate, it was enacted, that the overseer of the poor of every parish should levy such gaol-rate by such ways and means as any poor-rate is by law collected. Held, that as the power to make and levy rates had been taken from the overseers and given to certain commissioners, they were to be considered as overseers of the poor for the purpose of collecting the gaol-rate within the meaning of the act of parliament.

The commissioners under the first-mentioned act were to settle and ascertain the sums of money respectively necessary to be raised for the relief of the poor, and paving, &c. the streets, and make and sign rate or rates not exceeding the amount of the sum so settled and ascertained. At a meeting of the commissioners duly convened, it was adjudged neces-

sary to raise a sum not exceeding 1360*l.* for the use of the poor, and a sum not exceeding 500*l.* for paving, &c. the streets. Held, that the fair import of that resolution was, that those two sums were the smallest sum necessary to be raised for the purposes required, and, therefore, that those were the sums fixed and ascertained by the commissioners.

The commissioners ordered that the sum of 1300*l.* should be raised by a rate of 11*d.* in the pound, and the sum of 500*l.* by a rate of 3*d.* in the pound. If these rates had been collected upon the whole rental of the parish, they would have produced less than 1800*l.*, but the poor-rate would have produced more than 1300*l.*: Held, that as the act of parliament did not require separate rates to be made for the poor and for the highways, and as the entire sum directed to be raised would not exceed the sum required, the rate was good.

By the act for building the gaol, the justices at sessions were authorised to assess a special county rate upon every parish, for the payment of the expences of building such gaol, and that rate was made payable out of the monies collected in the parishes for the relief of the poor; and there was a proviso that every tenant might deduct out of his rent one half the amount of the rate. Held, that under the local act, the commissioners could not make a retrospective rate, in order to reimburse themselves in one year money which they had paid in a former year on account of the gaol-rate. *Cortis v. The Company of Proprietors of the Kent Water Works*, T. 8 G. 4.

POWER OF ATTORNEY.

A. B., who carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney; by the first of which authority was given *for him; and in his name, and to his use*, to do certain specific acts, (and, amongst others, to indorse bills, &c.) and generally to act for him as he might do if he were present; and by the second, authority was given "for him and on his behalf to accept bills drawn on him by his agents or correspondents." *C. D.*, one of *A. B.*'s partners, and who acted as his agent, in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in *A. B.*'s name by *procuracion*. In an action against *A. B.* by the indorsee of the bill: Held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the powers applied only to *A. B.*'s individual, and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that *C. D.* did not draw the bill in question as agent, but as partner: and, lastly, that the general words in the powers of attorney were not to be construed at large, but as giving general powers, for the carrying into effect the special purposes for which they were given. *Attwood and Others v. Munnings*, T. 8 G. 4. Page 278

PRACTICE.

1. A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was

referred to a barrister, and the costs of the cause were to be in his discretion. He found that the plaintiffs were entitled to recover, and ordered the defendants to pay the costs of the first cause. Held, that the plaintiffs were not entitled to the costs of the first trial. *Ripby and Others, Assignees, v. Oshelt and Others*, T. 8 G. 4. Page 67

2. In an action against a sworn broker of the city of London, for negligence in making a contract, the Court will, on motion, compel him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract. *Browning and Another v. Aylwin and Another*, T. 8 G. 4. 204

3. The sheriff having, under a fieri facias issued at the suit of a judgment creditor, seized the goods of a bankrupt, which the assignees claimed, the Court stayed the return of the fieri facias until the sheriff should be indemnified. The assignees of the bankrupt, in their own name, and not in their character of assignees, brought trespass against the sheriff and execution creditor, for seizing the goods, which consisted of the stock on a farm, which had belonged to the bankrupt. On the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and they had continued in possession several months before the goods were seized by the sheriff under the fieri facias. The Court refused to stay the proceedings in the action of trespass. *Bervasciani and Others v. Fairbrother and Winchester, Sheriffs of Middlesex and Wilton*, T. 8 G. 4.

4. An Irish peer cannot be arrested for a debt. *Coates and Another, Assignees, v. Lord Hawarden, M. 8 G. 4.* Page 388

5. Where a verdict in trover was obtained in vacation against a trader, who, after the first day of the next term, but before final judgment was signed, became bankrupt: Held, that final judgment, signed afterwards during the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate. *Greenway v. Fisher, M. 8 G. 4.* 436

6. When the sheriff is ruled to bring in the body, proceedings cannot be taken on the bail bond until that rule has expired; and if bail above are justified before that time, the bail below may in an action on the bond plead *compertit ad diem*; and that plea is satisfied by the production of the recognisance roll, containing an entry of the defendant's appearance generally.

Such roll may be made up at any time before the day given for producing it. *Whittle, Assignee, v. Oldaker and Others, M. 8 G. 4.* 478

7. The defendant having obtained a judge's order for delivery of particulars of the plaintiff's demand, and for staying proceedings until they were delivered, cannot sign judgment of non pros against the plaintiff for not declaring. *Burgess v. Swayne, M. 8 G. 4.* 485

8. Where A. B. executed a warrant of attorney in the name of C. B., and judgment was entered up, and a fi. fa. issued against him by that name: Held, that this was right, and that the sheriff was bound to execute it. *Reeves v. Slater, M. 8 G. 4.* 486

9. Where an award directed that

one of the two parties, to the submission should pay the expenses of the reference, and that the other should repay them on demand; and the former having paid them, made an affidavit of debt against the other party, alleging such payment, but not stating any demand of repayment: Held, that this was not sufficient. *Driver v. Hood, M. 8 G. 4.* Page 494

10. Where one of several defendants in a proceeding by foreign attachment in the mayor's court of London, removes it by certiorari, he must put in bail in K. B. for all the defendants, otherwise a procedendo will be granted. *Keat v. Goldstein and Another, M. 8 G. 4.* 525

11. Where a bill of Middlesex issued upon an affidavit of debt duly sworn, and that was followed up by a latitat into Surrey, upon which the party was arrested: Held, that the latitat was only a continuance of the former process, and that it was not necessary that a fresh affidavit of debt should be made. *Baker v. Allen, M. 8 G. 4.* 526

12. An attorney, upon receiving the amount of his bill, is bound to deliver up to his client, not only original deeds, &c. belonging to him, but also the drafts and copies. *Ex parte Horsfall, M. 8 G. 4.* 528

An attorney suing by latitat, and not by attachment of privilege, loses his right to retain the venue in Middlesex. *Mounsey v. Watson, H. 8 & 9 G. 4.* 683

14. In order to charge the bail, a ca. sa. against the original defendant must be in the sheriff's office four days before the return-day, exclusive of the day when it is lodged and of the return-day, and an intervening Sunday is not to be reckoned one of the four

four days. *Furnell v. S. Smith and Another*, H. 8 & 9 G. 4.

Page 693

15. The Court, in an action brought against the marshal for an escape, compelled him or his officer to permit the attorney of the plaintiff to inspect the writ of habeas corpus and return, and the committitur indorsed thereon. *Fox and Others v. Jones*, H. 8 & 9 G. 4. 732

16. An affidavit to hold to bail, purporting to be sworn "at the King's Bench office, Inner Temple, before T. C.," was held to be sufficient. *Howell v. Wilkins*, H. 8 & 9 G. 4. 783

17. Scire facias on recognisance of bail. Plea, no ca. sa. duly issued, lodged, and returned. Replication, ca. sa. issued and returned non est inventus. Rejoinder, that the ca. sa. did not lie in the sheriff's office four days, exclusive of the day it was lodged, the return-day and an intervening Sunday. Demurrer. Held, upon demurrer, that the rejoinder was bad. *Sandon v. Proctor*, H. 8 G. 4. 800

18. A general verdict was given for the plaintiff, on a declaration consisting of several counts, some of which were bad in point of law. The evidence applied to all the counts. The Court of Common Pleas, after a writ of error brought, and after argument in the court of error, amended the postea, by entering the verdict for the plaintiff on the first count, and for the defendant on the others; and amended the judgment-roll remaining in that court by the amended postea, after the judgment had been reversed by the King's Bench.

Semble, That the Court of King's Bench is bound to amend

the record by the amended record of the Common Pleas. *Mellish v. Richardson* (in error), H. 8 & 9 G. 4. Page 819

PRESENTATION.

See ADVOWSON.

PRESENTMENT.

See HIGHWAY, 4, 5.

PRINCIPAL AND AGENT.

1. *A. B.*, who carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney; by the first of which, authority was given for him, and in his name and to his use, to do certain specific acts (and amongst others, to indorse bills, &c.), and generally to act for him; as he might do if he were present; and by the second, authority was given "for him and on his behalf, to accept bills drawn on him by his agents or correspondents." *C. D.*, one of *A. B.*'s partners (and who acted as his agent), in order to raise money for payment of the creditors of the joint concern, drew a bill, which the attorney accepted in *A. B.*'s name by procuration. In an action against *A. B.* by the indorsee of the bill: Held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the powers applied only to *A. B.*'s individual, and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that *C. D.* did not draw the bill in question as agent, but as partner; and lastly, that the general words in the

the powers of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given. *Attwood and Others v. Munnings*, 11. 8 G. 4. Page 278

2. Where a broker, having accepted bills for his principal on the security of goods then in his hands, pledged the goods with a person who had notice of the agency, but did not inform the principal of this transaction: Held, that under the 16 G. 4. c. 94. s. 5, the broker could only transfer such right as he had, which was a right to be indemnified against the bills which he had accepted, and that the principal having satisfied those bills, was entitled to have back his goods from the pawnee without paying the amount for which they were pledged. *Fletcher v. Heath and Others*, 11. 8 G. 4. 517

PROBATE.

An act for making a navigable canal, provided that the shares were to be deemed personal estate, and to be transmissible as such. The canal passed through parishes in the diocese of Worcester, and other parishes in the diocese of Litchfield and Coventry. The transfers of shares in the canal were filed at the public office of the company in the diocese of Litchfield and Coventry, where the dividends were also paid, and books of account kept: Held, that for the purposes of probate, the right of a shareholder to a share of the profits, being personal property, might be considered as locally situate in the diocese of Litchfield and Coventry: and that a probate granted by the consistorial court

of the bishop of that diocese was sufficient. *Ex parte Horne*, 11. 8 & 9 G. 4. Page 632

PROMISSORY NOTE.

See BILL OF EXCHANGE, 4.

PROMOTIONS.

Page 1. 206. 383. 623.

QUARE IMPEDIT.

See ADVOWSON.

RATE.

See POOR RATE, 5.

RECOGNISANCE.

See ASSUMPSIT, 1. JUSTICES, 2.

RIOT.

See HIGH CONSTABLE.

RULE OF COURT.

Page 642.

SELECT VESTRY.

A custom that there shall be a select vestry of an indefinite number of persons continued by election of new members made by itself, and not by the parishioners, is valid in law:

Semble; That it must be part of such custom that there should always be a reasonable number, and that the reasonableness of the number must be decided with reference to long established usage, and to the population of the parish, such a custom having existed from time immemorial in a parish.

In the year 1852, by a faculty granted by the bishop of London, forty-

forty-nine persons, together with the vicar and churchwardens, were named as the select vestry, and that number was to be kept up by elections, to be made by ten at least of those forty-nine, together with the vicar and churchwardens. In the year 1673, this number of ten was, by another faculty, reduced to seven, and these faculties were acted upon ever afterwards. Ten out of the fourteen vestry-men, exclusive of the vicar and churchwardens, who were present at the vestry holden next before the promulgation of the first faculty, were part of the forty-nine named in that faculty: Held, that as the vestry appointed by the faculty, and since continued, was not inconsistent with the vestry previously existing by the custom, the custom was not destroyed by the parish having accepted the faculty, and acted upon it ever since, the faculty not being binding in law, and the vestry having power at any time to depart from its directions. *Golding v. Fenn*, H. 8 & 9 G. 4. Page 765

SESSIONS.

See ASSUMPT.

- The 54 G. 3. c. 84., which enacted that the *Michaelmas* quarter sessions shall be holden in the week next after the 11th of *October*, is merely directory, and those sessions may, notwithstanding that enactment, be legally holden at another time. *The King v. The Justices of the Borough of Leicester*, T. 8 G. 4. 6

SET-OFF.

A. was employed as store-keeper by B. and C., who were joint

adventurers in a mine, and he was authorised to draw bills on B. for money laid out on account of the mining company. The bills were discounted by a banker, and the payment of them was guaranteed to him by B. and C. B. having been arrested, A., in order to provide funds to procure B.'s discharge, drew on B. a bill, purporting to be on account of the mining company. The banker discounted the bill, and paid the amount to B. C. was afterwards compelled to take up the same in consequence of his guaranty. In an action, brought by A. against B. and C. for his salary, it was held, that C. could set-off the amount of the bill. *Jones v. Fleming and Jones*, T. 8 G. 4. Page 317

SETTLEMENT.

1. The wife of an *Irishman* who has no settlement in *England*, may, if deserted by him, be removed to her maiden settlement. *The King v. The Inhabitants of Cottingham*, M. 8 G. 4. 615
2. Where an examination of a soldier, taken before two magistrates, was tendered in evidence to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction: Held, that it was not admissible. *The King v. The Inhabitants of All Saints, Southampton*, H. 8 & 9 G. 4. 785

SETTLEMENT — by Apprenticeship.

1. The 56 G. 3. c. 189. s. 11, recited, that the salutary provisions enacted by the 43 *Eliz.* were frequently

quently evaded in the binding out of poor children, and that the premium of apprenticeship was clandestinely provided by parish officers, who were thus enabled to bind out poor children without the sanction of justices of the peace; and then enacted, "That no indenture of apprenticeship, by reason of which any expence whatever shall, at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices of the peace under their hands and seals, according to the provisions of the said act, and of this act." Held, that in order to make an indenture, by reason of which any expence had been incurred by the public parochial funds, valid and effectual, the approval of two justices should be under their hands and seals, and that such an indenture, approved of by two justices under their hands only, was void, and not voidable, and that no settlement was gained by serving under it. *The King v. The Inhabitants of Stoke Damerel*, M. 8 G. 4.

Page 363

2. It was proved by a pauper that he had been bound apprentice twenty-three years ago to A. B.; that indentures were signed and sealed, and that he served seven years, and that A. B. had the indentures; that when the apprenticeship expired, the pauper asked A. B. for the indentures, and he said the parish officers had them: Held, that the declarations of A. B., who might have been called as a witness, were not admissible in evidence, and that parol evidence of the contents was not admissible. *The King v. The Inhabitants of Denio*, M. 8 G. 4.

620

SETTLEMENT — by Birth.

A pauper first recollected himself in the workhouse of the parish of A., when he was about four years of age. He remained there till he was thirteen or fourteen years of age. He afterwards married, and lived in another parish, but when out of work, he returned on two different occasions to the parish of A., and was not only relieved by the officers of that parish, but received money from them to enable him to return to the parish where he lived. The sessions having found that he was not settled in the parish of A., the court affirmed their decision.

The fact of the pauper's remembering himself when four years of age in the parish of A., is no evidence that he was born there. *The King v. The Inhabitants of Frowbridge*, T. 8 G. 4.

Page 252

SETTLEMENT — by Certificate.

A parish certificate dated the 7th of September 1758, purported, in the body of it, to have been granted to a pauper and his family by two churchwardens and two overseers. It was signed and sealed by two overseers and by one churchwarden only. The churchwardens for the year 1758 were nominated at Easter, and were proved to have been sworn into office on the 15th of September at the visitation. But there was no direct evidence of their having been sworn into office before that time. The certifying parish after the date of the certificate had frequently relieved the pauper and different members of his family,

family, while they were residing in other parishes: Held, that in favour of such an ancient certificate, which had been treated by the certifying parish as valid, the Court would presume that the churchwarden who executed the certificate was sworn before he executed it, and therefore that it was duly executed by him as churchwarden: Held, secondly, that the execution by two overseers and one churchwarden was an execution by the major part of the churchwardens and overseers within the statute 8 & 9 W. 3. c. 30: *The King v. The Inhabitants of Whitchurch, M. 8 G. 4.* Page 573

SETTLEMENT — by Estate.

1. A man by marrying a woman who was a yearly tenant of premises under the annual value of 10*l.* held to gain a settlement. *The King v. The Inhabitants of Ynyssynhanarn, T. 8 G. 4.* 233
2. A woman seized of a messuage, &c. in the parish of A., as tenant in common with her three sisters, married, and resided for some years with her husband in the parish of B., where he was legally settled. The husband was transported, and the wife some time afterwards went with her daughter to live in the messuage in A., in which one of her sisters resided: Held, that she was irremovable; and the sessions having quashed an order removing her and her daughter, it was presumed that the latter was within the age of nurture, and therefore irremovable. *The King v. The Inhabitants of Brington, M. 8 G. 4.* 546
3. The sum paid by the purchaser of a copyhold estate to his attorney for the surrender, is no

part of the consideration for the purchase within the meaning of the statute 9 G. 1. c. 7. s. 5. *The King v. The Inhabitants of Cottingham, M. 8 G. 4.* Page 603

SETTLEMENT — by Hiring and Service.

1. Upon a special case, the court of quarter sessions found that a pauper hired himself as ostler to an innkeeper; that no earnest or wages were given, but he was to have what he could get as ostler; and he lodged and boarded in his master's house; and that either the master or servant might have determined the service when they pleased: it was held, that, upon this finding, this latter stipulation must be taken to have been part of the contract between the parties, and, consequently, that there was not any general or yearly hiring, and that no settlement was gained by serving under it. *The King v. The Inhabitants of Great Bowden, T. 8 G. 4.* 249
2. A pauper was hired by the commanding officer of a Royal Military College, to act as a servant in that establishment. By the terms of the hiring he was to obey all orders of the officers of the institution, and to be allowed weekly wages; and if he wished to quit the college he was to give one month's notice, but should the college be dissatisfied with his conduct, it retained the power of dismissing him at a moment's notice: Held, first, that this was a good hiring for a year, although either party might determine it before the expiration of the year; secondly, that a settlement was gained by such hiring, although it was not to a private person, the statute 3 W. &

S. W. & M. c. 11. s. 7. only requiring a lawful hiring and a service under it. *The King v. The Inhabitants of Sandhurst, M. 8 G. 4.* Page 557

8. The statute 29 Car. 2. c. 7. s. 5. enacts, that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's day, and subjects parties offending to a penalty: Held, that this statute only prohibits labour, business, or work done in the course of a man's ordinary calling, and, therefore, that a contract of hiring made on a Sunday between a farmer and a labourer for a year, was valid, and that a service under it conferred a settlement. *The King v. The Inhabitants of Whinash, M. 8 G. 4.* 596

SETTLEMENT—by Parentage.

A pauper twenty years of age, whose father was settled in the parish of A., contracted to serve the captain of a ship two summers and a winter. He continued in the service until he attained twenty-one years of age, but before that time his father acquired a settlement in another parish: Held, that the pauper was not emancipated before he attained the age of twenty-one, and, consequently, that his settlement followed that of his father. *The King v. The Inhabitants of Lytchet Matraverses, T. 8 G. 4.* 326

SETTLEMENT—by Payment of Parochial Taxes.

The being charged with and paying parochial taxes did not before the statute 6 G. 4. c. 57. s. 2. con-

fer any settlement until the party charged with and paying the same had resided within the parish forty days after he had been so charged; and since that statute passed no person can acquire a settlement by reason of paying parochial taxes for any tenement, unless it be of a certain description; and, therefore, where a pauper had rented a tenement insufficient to confer a settlement under the 6 G. 4., and in respect thereof had been rated, and paid parochial taxes, but had not resided there before such rating and payment forty days before the passing of the 6 G. 4., it was held that he did not thereby acquire any settlement. *The King v. The Inhabitants of Ringstead, M. 8 G. 4.* Page 607

SETTLEMENT—by Renting a Tenement.

1. In December 1825, a house was hired at twenty guineas a year, the rent to be paid weekly, and either landlord or tenant to be at liberty to determine the tenancy at three months' notice from any quarter day. Held, that this was a renting of a tenement for one whole year within the meaning of the statute 6 G. 4. c. 57.; and that the pauper having occupied the same and paid the rent for a year, gained a settlement. *Rex v. The Inhabitants of Herstmonceux, M. 8 G. 4.* 551

2. Where a pauper bona fide hired a house and garden in A. for a year, at the rent of 10*l.*, and occupied it for a year, and the whole rent was paid to the landlord, but not by the pauper: Held, that he nevertheless gained a settlement in A., inasmuch as the

the statute 6 G. 4. c. 57. did not require that the rent should be paid by him. *The King v. The Inhabitants of Kilmouth Harcourt*, H. 8 & 9 G. 4. Page 790

SHARES IN A NAVIGABLE CANAL.

See PROBATE.

SHERIFF.

1. The sheriff having, under a fieri facias issued at the suit of a judgment creditor, seized the goods of a bankrupt, which the assignees claimed, the Court stayed the return of the fieri facias until the sheriff should be indemnified. The assignees of the bankrupt in their own name, and not in their character of assignees, brought trespass against the sheriff and execution creditor for seizing the goods, which consisted of the stock on a farm, which had belonged to the bankrupt. On the issuing of the commission the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils; and they had continued in possession several months before the goods were seized by the sheriff under the fieri facias. The Court refused to stay the proceedings in the action of trespass. *Bernasoni and Others v. Fairbrother and Winchester, Sheriffs of Middlesex and Wilton*, T. 8 G. 4.

979

2. Where A. B. executed a warrant of attorney in the name of C. B., and judgment was entered up, and a f. fa. issued against him by that name: Held, that this was right, and that the sheriff

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was bound to execute it. *Reeves v. Slater*, M. 8 G. 4. Page 486

3. In an action of trover against the sheriff for goods taken in execution, it is sufficient for the plaintiff to give in evidence the warrant issued by the undersheriff under the sheriff's seal of office, and he is not bound to prove the writ. *Gibbins v. Phillips*, M. 8 G. 4. 535 n. (a).

SHIP OWNER.

Where A., the managing owner of a ship, mortgaged his share to B., who procured the transfer to be duly indorsed on the certificate of registry, but A. continued in the management as before, and B. did not take possession or interfere in the concerns of the ship: Held, that he was not liable for repairs and necessities done and supplied in pursuance of A.'s orders. *Briggs v. Wilkinson and Others*, T. 8 G. 4. 30

SOLDIER.

See SETTLEMENT, 2.

STAGE COACHES.

The statutes 3 Car. 1. c. 1. and 29 Car. 2. c. 7. do not make it illegal for stage coaches to travel on the Lord's day. *Sandiman v. Breach*, T. 8 G. 4. 96

STAMP.

1. Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately; and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only

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was stamped: Held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it; and that, therefore, the plaintiff could not exclude the second agreement and proceed upon the counts setting out the first only. *Reed v. Deere*, T. 8 G. 4. Page 261

2. Where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement as if it had been repeated therein: Held, that the clause referred to could not be considered as annexed to the new agreement so as to make an additional stamp necessary, on the ground of the agreement with the clause containing more than 1080 words. *Attwood v. Small and Others*, M. 8 G. 4. 390

3. Where an inclosure act gave the commissioners power to award lands in exchange for others in an adjoining parish, and also to award lands to those who bought them of persons entitled to allotments: Held, that they might award lands given in exchange, partly for other lands and partly for money, and that the award need not have an ad valorem stamp upon the money consideration. *Doe dem. Lord Suffield v. Preston*, M. 8 G. 4. Page 392

4. Articles of agreement, whereby one party agreed to pay the other a fixed salary, and the other agreed not to set up a chemist's shop within a certain distance, and the parties were mutually bound in a penalty of 600*l.* to perform the agreement: Held to require a stamp of 1*l.* 1*s.* *Mounsey v. Stephenson*, M. 8 G. 4. 403

5. Where a parol agreement was

made between A. and B., that the former should let, and the latter take certain premises upon the terms and conditions contained in a lease of the same premises granted by A. to C.: Held, that in an action by A. against B. for rent and non-repair, the lease could not be read in evidence unless duly stamped. *Turner v. Power*, H. 8 & 9 G. 4. Page 625

6. In an action for not returning bills deposited with defendant, the following unstamped memorandum signed by the defendant was held to be admissible in evidence: "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted or return on demand. *Mullett v. Hutchinson*, H. 8 & 9 G. 4. 639

SUNDAY.

See STAGE COACHES.

The statute 29 Car. 2. c. 7. & 5. enacts, that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's day, and subjects parties offending to a penalty: Held, that this statute only prohibits labour, business, or work done in the course of a man's ordinary calling; and, therefore, that a contract of hiring made on a Sunday between a farmer and a labourer for a year was valid, and that a service under it conferred a settlement. *The King v. The Inhabitants of Whitman*, M. 8 G. 4. 696

SURVEYOR.

See HIGHWAY, 4.

TOLLS.

TOLLS.

See *ROBE. RATE*, 3.

TREASURER.

An act of parliament directed that 20 the commissioners, or the major part of them, assembled at any meeting, not being less than thirteen, might, by writing under their hands, appoint a treasurer: Held, that an appointment of a treasurer signed by a majority of nineteen commissioners present at a meeting was valid, and that it need not be signed by thirteen. The act directed all actions to be brought in the name of the treasurer. An order was made by the commissioners, that an action should be brought to recover certain rates. At the time when this order was made A. was treasurer, but when the action was commenced B. was treasurer: Held, that the latter had authority to prosecute the action in his name for the benefit of the commissioners, and was entitled to recover the rates due to the commissioners before he was appointed treasurer. *Cortis v. The Proprietors of the Kent Water Works*, T. 8 G. 4. Page 314

TRESPASS.

See *PLEADING*, 3. *JUSTICES*, 2. 4. *HIGHWAY*, 1; 2; 3.

A party having the legal title to land, having entered, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards. *Butcher v. Butcher*, M. 8 G. 4.

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TRIAL.

See *COSTS*, 1.

TROVER.

1. A. agreed with B. to make a gig for a given price. The body of the gig and wheels were selected by B., and A. promised to deliver it in a few days. The full price was paid. Before it was finished, it was seized by the sheriff under a fi. fa. issued against A. The gig was afterwards finished and delivered to B. with the assent of the judgment creditor. The sheriff afterwards retook it to secure his poundage: Held, that he had no right to do so, and that B. might maintain trover for the gig.

Query, Whether the property in the gig vested in the purchaser before delivery. *Goode v. Langley and Others*, T. 8 G. 4.

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2. The assignees of a bankrupt having once affirmed the acts of a person who wrongfully sold the property of the bankrupt, cannot afterwards treat him as a wrongdoer and maintain trover. *Brewer and Another, Assignees, v. Sparrow*, T. 8 G. 4. 310

3. Where a verdict in trover was obtained in vacation against a trader, who, after the first day of the next term, but before final judgment was signed, became bankrupt: Held, that final judgment signed afterwards, during the same term, related to the first day of the term, and that the debt thereby created was barred by the bankrupt's certificate. *Greenway and Another v. Fisher*, M. 8 G. 4. 436

4. A. agreed to give B., a coachmaker, 100*l*. for a coach, and to pay

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pay for the bills by four bills of 25*l.* each; and further, that B. should have a claim upon the coach until the debt was duly paid. The bills were given, but the first was not paid when it became due. A. died, his administratrix sent the coach to B. to have the wheels repaired. B. detained it, on the ground that the bills had not been paid. Held, in an action of trover brought by the administratrix, that the agreement operated as a mere licence from A. to B. to take the coach if the bills were not paid; that it was not transferable, and that the coach having vested in the administratrix by operation of law, the defendant was not justified in detaining it. *Howes v. Ball*, 8 G. 4.

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5. In an action of trover against the sheriff for goods taken in execution, it is sufficient for the plaintiff to give in evidence the warrant issued by the undersheriff under the sheriff's seal of office, and he is not bound to prove the writ. *Gibbins v. Phillips*, 8 G. 4.

TURNPIKE ACT.

See HIGHWAY, 2.

USURY.

1. Where a broker carried bills to be discounted, and allowed to the person discounting interest at the rate of 5*l.* per cent. per annum, and, in addition, 1*l.* per cent. on the amount of the bills towards the payment of a debt due from a third person, but which the broker thought himself bound in honour to pay, and the broker accounted to his principals for the whole amount of the bills, minus lawful discount and com-

mission. Held, that the transaction was usury. *See Howes v. Ball*, 8 G. 4. Page 480. Where a contract was made for the sale of an estate at a certain price, and it was agreed that this should be paid by instalments at certain future days, with interest calculated at 5*l.* per cent. per annum, and promissory notes were given for these sums, compounded of the instalments, and that which was called interest: Held, that the whole must be considered as the purchase money of the estate, and that the bargain was not usurious. *Beete v. Diddard*, 8 G. 4. 453

VARIANCE.

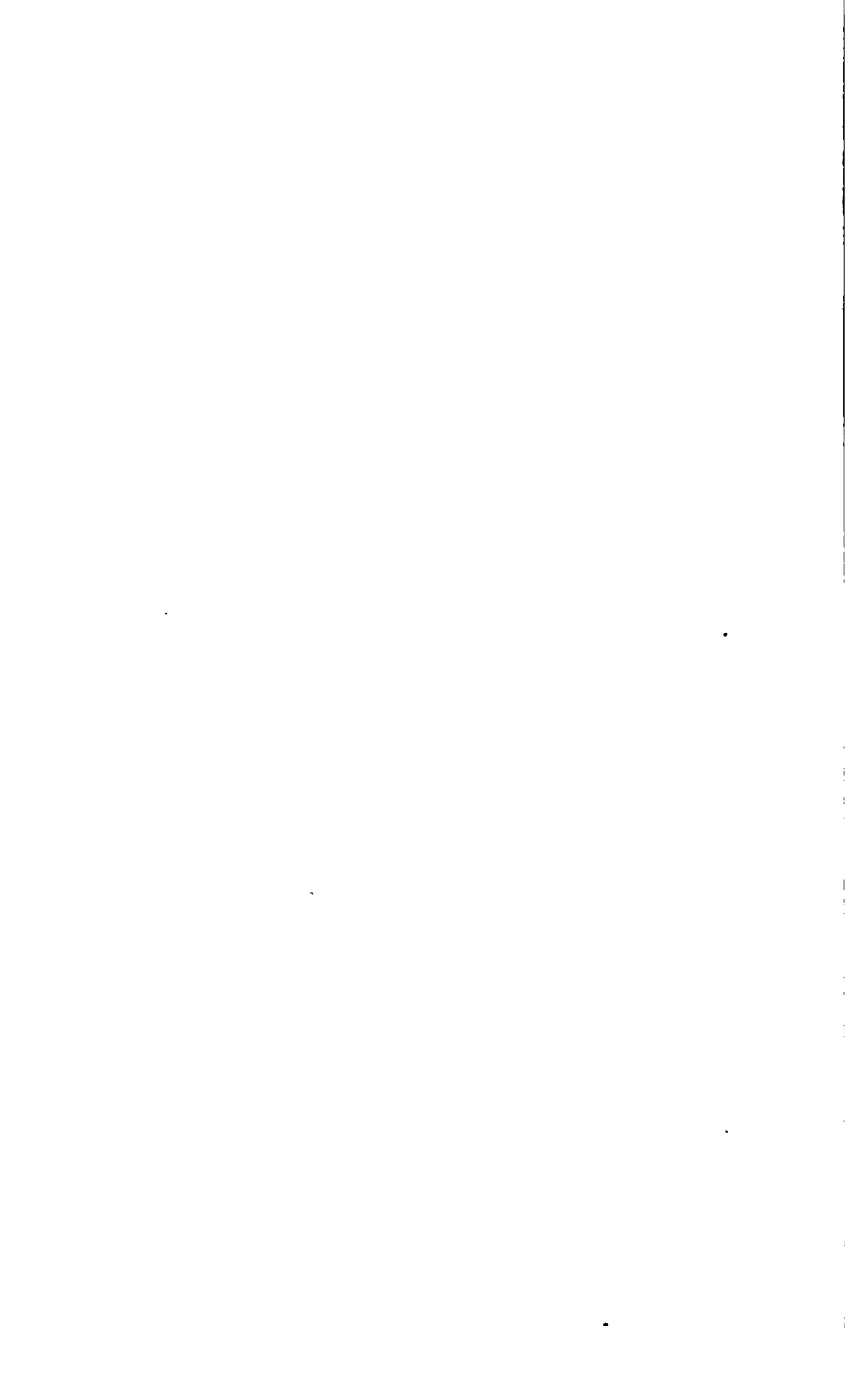
Where, in case the declaration stated that plaintiff delivered a trunk to the defendant to be put into a coach at Chester in the county of Chester, to wit, at, &c., and safely carried to Shrewsbury, and that through defendant's negligence it was lost; and it appeared in evidence that the trunk was delivered to the defendant at the city of Chester, which is a county of itself, separate from the county of Chester at large, but within its ambit: Held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called Chester. *Woodward v. Booth*, T. 8 G. 4. 301

VENDOR AND VENDEE.

1. Where the seller of goods received from the purchaser an order









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